CERTAINTY AND JUSTICE

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STUDIES OF THE CONFLICT BETWEEN PRECEDENT AND PROGRESS IN THE DEVELOPMENT OF THE LAW

BY

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PREFACE

The conflict between the wisdom of past generations as embodied in "Precedent" and the ideas of the present day concerning right and justice, usually denominated "Progress," has been for some time past more than usually acute. Questions that were formerly relegated to the dry discussions of legal technicians have now found their way into the press and into the forum of partisan political controversy.

It appeared to me that these studies might consequently be of some general interest at the present moment and in the somewhat disturbed state of public opinion on so many questions of fundamental importance.

The substance of the chapters here entitled "Certainty and Justice," "Jury Trial as an Instance of Constitutional Development," and "Criminal Pro-

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cedure and the Constitution" appeared in the *Yale Law Review* in May, 1905, and March, 1910.

"The Constitution and Our New Peoples" and "Perversion of Precedent" appeared in the *Columbia Law Review* of January, 1903, and March, 1909.

The chapter on "The Law and Our Industrial Development" with slight modification appeared in the *North American Review* of July, 1911.

"Aliens and the Progress of the Law," "The Modern Treatment of Political Crime" and "The Crisis of the Law" furnished in the main the substance of addresses; the first two at annual meetings of the Society of International Law, at Washington, 1911 and 1909, and the latter at the annual meeting of the American Bar Association, at Boston, August, 1911.

The two remaining chapters are now published for the first time.

FREDERIC R. COUDERT.

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CONTENTS

CHAPTER		PAGE
I.	Certainty and Justice	1
II.	The Challenge to the Constitution	24
III.	What is the Matter with the Law?	35
IV.	Jury Trial as an Instance of Constitutional Development	59
V.	Criminal Procedure and the Constitution	101
VI.	The Constitution and Our New Peoples; Citizens, Subjects, Nationals or Aliens	129
VII.	The Law and Our Industrial Development. "The Rule of Reason"	159
VIII.	Perversion of Precedent. *Stare Decisis.* History Misinterpreted	205
IX.	Aliens and the Progress of the Law	244
X.	Progress of International Law in Treatment of Political Crime	271
XI.	The Crisis of the Law; Professional Incompetency	303

CERTAINTY AND JUSTICE

I

CERTAINTY AND JUSTICE

THERE is in all modern states to-day a general conflict between certainty in the law and concrete justice in its application to particular cases; in other words, between the effort to have a general rule everywhere equally applicable to all cases at all times and the effort to reach what may seem to be concrete right dealing between the parties at bar upon the particular facts in each case. On the one side is made an appeal to "Progress"; on the other to "Precedent."

In actual practice the pendulum swings first one way and then the other. The social necessity for stability in the law is unquestioned. Law is necessarily a rule of action, and unless a court decides cases according to some cohesive plan or definite rules, the justice administered is scarcely deserving of the name of *law,* however closely it may fall

in with the ethical notions of the community as regards any particular case. On the other hand, when rules become so fixed and rigid that they are difficult or impossible to change, the law is out of touch with prevailing views of social expediency, which, like other opinions, are constantly changing; the law thus necessarily becomes a clog upon national development, an incentive to revolutionary reform.

Among semi-civilized people, absolute adhesion to the letter of the law is the prevailing system. In the ancient Roman law of the twelve tables, contracts in order to have any validity had to be made in specific formulæ, or by the repetition of certain particular words. It was not the substance of the contract relation—that is to say, the meeting of the minds and the consent of the parties as to the subject-matter of the contract—that was looked to, but the formalities by which that meeting was evidenced. The legal value still attached to the use of a seal attests the mystic force of form among primitive peoples.

Again, in the medieval world, trial by ordeal supplanted, to a great degree, the rational methods of determining facts. There was no doubt felt of the guilt of the man whose feet were burned by walking on red hot iron, and this method had the advantage of leaving open no questions for dispute.

But with the growth of modern civilization, came the necessity for applying to law cases a general ethical standard according in some degree with that of the age.

Nevertheless, a reasonable degree of certainty is a necessity in every system of law; as a consequence, the common law doctrine of *Stare Decisis* was gradually evolved by the English law courts as one mode of bringing about some sort of coherence in the justice administered by tribunals and in formulating the justice into rules of law. That the doctrine is an old one does not admit of doubt and modern research seems to indicate that it was first vaguely adumbrated as far back as the fourteenth century.

In truth the doctrine is founded upon one of the peculiarities of human nature which in its ultimate analysis is based upon the imitative faculty in man. The mass of men will naturally follow in a beaten track, rather than branch out into new and untrodden ways, and the courts naturally fell into the habit of following precedent, just as merchants fall into the habit of following certain usages of trade which after a time harden into customs. In this way the judges, by making a line of uniform decisions on any question, create a judicial custom which in its turn acquires, almost unconsciously, the force of law.

Nor must it be forgotten that law courts are much older than legislatures, hence their power to retard or expedite legal development was once much greater than it now is. The activity of modern legislatures is of very recent date.

That the English courts have gone much farther than our own in upholding the dignity of the doctrine of *Stare Decisis,* may be easily illustrated by one or two prominent instances. In 1843 the famous case of *Queen v. Millis* (10 C. and F. 534) came before the House of Lords. The case was a prosecution for bigamy. The question there involved was as to whether a marriage contracted in Ireland, without the presence of an ordained clergyman or priest of the Church of England, was valid. The Marriage Act not applying there, the common law alone governed. It was contended that in England the presence of a priest had been unnecessary to such marriage by the rule of the canon law prevailing throughout western Christendom up to the time of the decree of the Council of Trent, which, owing to the separation of the Church of England from the Roman Catholic Church, had not come into force there. The House of Lords however, decided from one or two precedents, which historic research has now discovered were erroneously interpreted, that the law of England in this particular had differed from that of the rest of

Western Europe and that a marriage without the presence of such priest was invalid. The decision was reached by a divided court, the members of that tribunal standing three to three, the form of the question, however, being such that the decision was necessarily in favor of the invalidity of the marriage.

In 1861 this historically erroneous decision, reached by an equally divided court, was brought in question before the same tribunal in the case of *Beemish v. Beemish* (IX H. L. 275). The very same questions being again presented, a majority, at least, of the judges were of the opinion that the decision of *Queen v. Millis* was reached upon a false historical basis and that the precedents adduced from the early English law to support that decision, were misunderstood by the court. Lord Campbell himself took that view. Nevertheless, the court felt bound to follow that case and decided, contrary to the historic fact, that a marriage without the presence of a clergyman of the Church of England was and always had been invalid at the common law.

In rendering this decision, Lord Campbell said that he felt himself bound by the doctrine of *Stare Decisis* and that to depart therefrom would be a usurpation upon the part of the House of Lords. His theory was that the law once laid down by that

tribunal became the law of the land, as binding upon the tribunal itself, as upon every other subject, and changeable only by the supreme authority of Parliament. This case contains the strongest utterances that I have been able to find upholding the absolute obligation of the rule of *Stare Decisis*.

"Had the present case been brought here by writ of error previously to the decision of this House in the year 1844 in the case of *Queen v. Millis,* I should not have hesitated in advising your Lordships to affirm the judgment in favor of the validity of the marriage and the legitimacy of the respondent."

After giving his reasons for believing that a marriage without the presence of a priest was valid at the common law, he continues:

"However it must now be considered as having been determined by this House that there could never have been a valid marriage in England before the Reformation, without the presence of a priest episcopally ordained, or afterward without the presence of a priest or of a deacon * * * My Lords, the decision in the case of the *Queen v. Millis* that unless a priest especially ordained was present at the marriage ceremony the marriage was null and void and the children of the marriage were illegitimate, seemed to me so unsatisfactory, that I

deemed it my duty to resort to the extraordinary proceeding of entering a protest against it on your Lordships' journal."

And yet he continues:

"But it is my duty to say that your Lordships are bound by this decision as much as if it had been pronounced *nemine dissentiente* and that the rule of law which your Lordships lay down as the ground of your judgment, sitting judicially, as the last and Supreme Court of Appeal for this Empire, must be taken for law till altered by an act of Parliament agreed to by the Commons and the Crown as well as by your Lordships. The law laid down as your *ratio decidendi* being clearly binding on all inferior tribunals and on all the rest of the Queen's subjects, if it were not considered as equally binding upon your Lordships, this House would be arrogating to itself the right of altering the law and legislating by its own separate authority."

The ardent law reformer, Bentham, in his dread of judicial encroachment could hardly have gone farther in limiting the power of appellate courts.

It must be remembered, however, that even in England that useful and somewhat modern instrument—the distinction—is not unknown and the results of strict adherence to *Stare Decisis* may in many cases be escaped or mitigated by the use of

that now highly-developed weapon, even where to the ordinary mind the distinction would not seem to involve any appreciable difference.

It is a rather curious thing that Lord Campbell's views, which, at the time of their utterance, seemed to be in every respect most conservative, were enunciated in almost the same language by Mr. William J. Bryan in his campaign as candidate of the Democratic Party for the Presidency in 1896. At that time he was generally looked upon as an extreme radical, and his views as to the Supreme Court were the subject of severe strictures. I do not now intend to comment upon their wisdom or unwisdom, but his underlying view, as I understand it, was that the Supreme Court once having passed upon a question, that decision became the law of the land and was binding upon that august tribunal as well as upon all other American citizens. That view, which to many seemed so startling as to savor of revolution, in any event had in it nothing of novelty, and if Mr. Bryan did not cite the authority of Lord Campbell, it was probably because he had overlooked it. Whether the doctrine as enunciated by him would have sounded less harsh had it been backed by the authority of that great name, it is impossible to say. In the heat of political conflict it might have mattered little.

It is a significant but not unusual fact, however,

that the same doctrine should be considered as over-conservative or as over-radical, dependent upon the position of the person announcing it and the circumstances of its announcement.

Mr. Justice Holmes, one of the leading authorities on the history of English laws, adopts what would seem to be a very different standpoint. He believes the judge-made law to be a slow and steady growth which must adapt itself to present needs and present necessities, and that the formal rules of the syllogism do not and should not be allowed to fetter the judges in reaching a result compatible with present ethical notions and sound public policy.

"On the other hand, in substance the growth of the law is legislative. And this in a deeper sense than that what the courts declare to have always been the law is in fact new. It is legislative in its grounds. The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions but none the less traceable to views of public policy in the last analysis. And as

the law is administered by able and experienced men, *who know too much to sacrifice good sense to a syllogism,* it will be found that, when ancient rules maintain themselves in the way that has been and will be shown in this book, new reasons more fitted to the time have been found for them, and that they gradually receive a new content, and at last a new form, from the grounds to which they have been transplanted."

This latter view would seem to be, at least in practice, the one more generally prevalent in the United States. The highest courts, although expressing great regard for the doctrine of *Stare Decisis,* do not hesitate to overrule prior decisions upon the ground that they were erroneously rendered, as the Supreme Court itself has done upon several occasions notably in the Legal Tender and Income Tax cases and the Passenger cases. The soundness of this latter view depends upon how far conformity to present standards of justice is more important than certainty as to what the law actually is. It would surely be better if more cases were overruled directly than by the indirect method of the distinction.

By the indirect method a case once deemed to be law is gradually so honeycombed with exceptions and distinctions that after a certain number of years it finally collapses—in the meanwhile, however, like a dangerous derelict, spreading confusion among

litigants, and consternation, real or feigned, among lawyers.

It is to be deprecated that in many cases respect for *"la chose jugée"* should not allow the case to be directly overruled. In the long run it may well be questioned whether the maintenance or the dignity of the doctrine of *Stare Decisis* profits by the respect apparently paid to it through a resort to distinctions that do not distinguish.

On the other hand, a strict adherence to the adjudged cases would prevent all progress in the law, as has been pointed out by Mr. Justice Matthews in the famous case of *Hurtado v. California* (110 U. S. 516), and would result in a rigidity incompatible with social progress:

"To hold that such a characteristic is essential to due process of law, would be to deny every quality of law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians."

That delightful and most erudite old writer, Montaigne, gives an instance of how far false respect for a judicial decision may be carried. He says that he heard of a case occurring in his time in which a thief, having been convicted by the magistrates of a certain French province, was condemned

to death. While awaiting execution the judges of a neighboring province sent word to the judges of the tribunal that had condemned the supposed culprit, that the real culprit had been found, had confessed his guilt and was about to be punished. The judges of the first court held solemn deliberation on the question as to whether justice required that the innocent man, adjudged guilty, should be freed or whether respect for *"la chose jugée"* did not require that the court should proceed with the execution of the sentence. The latter view prevailed. The dignity of the tribunal was thus sustained by the prompt and solemn execution of the legally adjudged guilty, but in fact innocent, victim.

The truth is that the courts are constantly oscillating between a desire for certainty on the one hand and a desire for flexibility and conformity to present social standards upon the other. It is impossible that in a progressive society the law should be absolutely certain; it is equally impossible that the courts should render decisions conforming to the prevailing notions of equity without thereby causing a considerable degree of uncertainty, owing to the constant fluctuations in moral standards and their application to new and unforeseen conditions.

New opinions are often due to economic changes, and many views regarding natural rights or individual liberty which were held fundamental in the

last century sometimes find little support in the public opinion of the twentieth by reason of altered social and economic conditions.

The rights of the man were once opposed to those of the State alone. The individual is now opposed not only to the State, but also to great aggregates of wealth in corporate form possessing in a large degree public powers. The rules as to freedom of contract evolved before the rise of corporations as the main factors in the business world are not always justly applicable to present conditions.

When a series of questions has finally become settled, such as the law relating to partnership or negotiable instruments, it is because that particular branch of business has reached for the time being, at least, an ultimate form and we have certainty in law because we have fixity in business custom and opinion.

It has been happily said that the sense of equity of one generation is generally the law of the next, but this very fact involves a slow process of change and adaptation resulting in consequent uncertainty.

There is much criticism at the bar and among the people at the present time, of the growing uncertainty of law, as enunciated in judicial decisions; panaceas of all kinds are suggested by zealous and sometimes intelligent men, but the law reformer is a dangerous animal and one often calculated to do

infinite mischief. He usually believes himself to possess more concentrated wisdom than all the generations of lawyers and judges who have gone before, and actual experience has proved that his self-valuation is not infrequently an over-appraisal.

It is perhaps not unprofitable to inquire whether the people of the Continent of Europe are so much better off than ourselves in regard to certainty in their law. An extended attempt at comparison on this point would involve work far beyond the scope of this chapter. A few reflections, however, upon the Continental method may not be without interest.

The fear of the uncertainty of judge-made law and the usurpation of courts has been even more prevalent in Europe than in America. The recent attack on the courts is no new thing.

The French law was supposed not to recognize the authority of adjudged cases, but in fact the result actually reached is very similar to that in England and America. The Court of Cassation was established for the purpose of unifying judge-made law, which had been made uniform as far as legislation could effect it, by the Code Napoléon. The Court of Cassation has jurisdiction over all cases coming up from the various courts of appeal, of which there are some twenty-six, in France, and, by the Statute of 1837, the decisions of the Court of Cassation were made authoritative, so that they

had to be followed by all courts of appeal. This statute was made necessary by the hopeless conflicts which had arisen between the various courts of appeal, and the uncertainty thus engendered was so great as to call for radical remedy. But in addition to the decisions of the Court of Cassation, the French judges in the courts of appeal naturally desire to have a certain amount of uniformity in their decisions and therefore where one or two similar decisions are rendered they are generally followed and a judicial usage on the subject is thus established, much as in England or America. The only practical difference would seem to be that the French courts will not hesitate to overrule a case which they believe has become antiquated or was originally erroneously decided, and thus they do not so frequently resort to the method of the distinction which with us not infrequently accomplishes the same result through fiction. As a consequence the French lawyer is confronted with a great number of reports, the number of reported opinions in France being perhaps greater than that of any one state of the Union.

The Code Napoléon left certain great gaps which could only be filled in by legislation or by judge-made law. That almost unique body of law once hailed as the ideal code for all peoples has now been found to contain no remedy for many modern evils.

As commercial corporations had scarcely begun to develop at the time of the adoption of the Code, there was almost nothing in that body of legislation to cope with the modern conditions which grew up thereafter, and hence under the Second Empire the void had to be filled and a detailed law of corporations enacted.

In many instances provisions of the Code have been in effect wholly repealed by judicial decisions so that a directly opposite result from that desired by the codifiers has been in fact reached. Trusts were abolished by the Code and yet have been to a great extent revived by the courts. State annuities were not attachable under the French law, but by a long line of decisions a result has been reached which in fact makes them attachable for debt, and other instances to the same effect might be cited.

It must also be remembered that the Code, admirable as it is by reason of its lucidity, due in great measure to the French language so wonderfully adapted to the expression of clear thought, is now becoming in many respects antiquated. A movement is on foot in France to change the Code in essential particulars. The nation feels that its system of law has been more or less outgrown and finds itself in the condition of a boy who has outgrown his youthful clothes. The system of French law is criticized as one incompatible with the notions

of to-day, as belonging in many respects to a social system which has in great measure passed away. The French Minister of Justice at the celebration of the centenary of the "Code Civil," 1904, used the following significant language:

"The Code Civil did not and could not foresee everything. It would be puerile to deny that it needs revision, for in fact Parliament does revise it. Already many drafts of laws on corporations and insurance are presented for enactment into legislation which really present the appearance of special codes, and in addition the work of making a Code of Labor is progressing.

"Thus the great voids in the Civil Code are being filled in. *Moreover, judicial decisions reveal from day to day the new needs of society and apply the will of the nation to particular cases, disclose new formulæ and reveal new sources of law by providing new sources of light.*

"I would ask to have a great commission appointed to compare our Civil Code with those of other peoples, to note the differences, to analyze the solutions of the new problems adopted by foreign legislations, and to study the solutions reached by our neighbors, in order that we may profit from the work of all, as all have profited from the work of the French jurists.

"The more the intellectual domain of humanity is enlarged, the more the development of industry and of science diversify forms of production and forms of property, the more the political ascend-

ency of the proletariat tends to cause a recognition by society of new rights and of contracts heretofore unknown, the less can it be pretended that a code can contain and hem in the powerful movements of a nation's life.

"What then is the use of our re-making our Code from the beginning? It never prevented changes in the law, nor did it ever paralyze the law. It can be adapted to every change and seems like a well-conceived plan where every degree of progress may naturally be placed under its proper classification."

It is thus very doubtful whether the French law is any more certain than our own. If ours be more uncertain we are inclined to believe that it is because economic changes here have taken place more rapidly than elsewhere, and greater pressure has been put upon the courts to decide cases arising out of novel business situations.

The fact is that the two systems, English and Continental, while founded upon different theoretical bases are tending toward much the same results in much the same way. Law reformers have been for a long time suggesting the codification of our law. As far as greater certainty is concerned, I do not see any advantage to be derived from codification. The main objection to codification is the difficulty of obtaining from our legislatures a good code and one that is not in constant danger of

amendment for the purpose of meeting specific cases. That *monstrum horrendum,* the Code of Civil Procedure of New York, is so lamentable a monument of the failure of legislative attempts at codification that it is not necessary to refer to it in detail.

The foreign codes have the advantage of a fixed and settled terminology derived from the Roman law. They were made by experts and are comparatively little subject to legislative change. In addition it must be remembered that the making of the Code Napoléon, as well as that of the recent German Code, was due to a desire for uniformity in law rather than of certainty. As Voltaire remarked of old France: "One changed systems of jurisprudence each time one changed his omnibus;" therefore the Code was made for the purpose of giving the nation a national law rather than for the obtaining of certainty in any one or more branches of the law. Some of the Continental codes are very defective and have hindered legal development.

The French Code of Commerce is inferior to the Code Civil in every respect. It demonstrates one of the most marked defects of code law in that it codifies commercial usages of the seventeenth century and thus retards the development of French law in those important particulars.

Another objection to a code is that even a well-constructed code would help us little in making the law more certain. The general principles or rules on many subjects are pretty well settled and easily stated. The common law of tort, partnership, or negotiable instruments is admirably summed up in various text-books and can without great difficulty be codified, but that would do little to help us out of our difficulties, for the problem arising in these branches of the law is usually not what is the rule of law, but which of several rules apply to the facts of the case. The divisions that have taken place in our Supreme Court have not been due to common law questions, but to questions arising under various statutes and under the Constitution of the United States, one of the clearest and most admirable of written instruments. As the most familiar instance of this, it is only necessary to cite the Insular cases, the Legal Tender cases, the Income Tax cases and the anti-trust law cases. In each of these the difficulty has been to ascertain whether the law applied to a particular state of facts and if it did apply, which portion of it was applicable. Did the Sherman Act intend to codify the common law? Was it merely declaratory or was it revolutionary? The answer must be sought in many opinions extending over a period of years. Such questions

cannot be avoided and constantly arise under statutes.

And again, should we codify our law, the old decisions would be cited as an attempt to show what the law was intended to do and we would not get rid of the mass of case law which now so sorely burdens and perplexes the practitioner.

The civil law of Rome grew largely out of commentaries on the Twelve Tables, and it was really the commentators who expressed the law, long after the Twelve Tables had ceased to represent the legal views of the time. Justinian endeavored by law to prevent the writing of commentaries on his Code and Napoleon is reported to have exclaimed, when it was announced to him that a commentary on the code had already appeared: "My code is lost!" There is thus no patent remedy for the situation of legal uncertainty that confronts us. It is due to changing social conditions and the conflict of new opinions with old ones, which is now at so acute a stage.

Mr. Henry C. Lea, the eminent American historian, has said that if you wish to understand the ideas that dominate a particular age, you must examine its jurisprudence. Perhaps the complex and confused condition of our jurisprudence is a more faithful reflex of the public mind than we realize. Certain great branches of the law have been pretty

thoroughly worked out and the ideas of the community thereon crystallized into positive rules. Whether this has been codified or is found in the judicial decisions, is of little importance. On other great questions, such as the relation of capital and labor and of corporations to the state and the individual, the public mind is in a flux. It will be impossible to get uniformity in this regard until we have some uniformity in opinion, which will then reflect itself through legislation and through judge-made law. The one will be confused and incoherent, the other vacillating and uncertain until such a time arrives.

For the present, reforms in the administration of the law, the selection of able men as judges, the leaving of procedural questions, as has been done in Massachusetts, largely to the regulation of the courts themselves by means of rules, are all desirable and immediate objects of attainment. But to make the law certain on subjects as to which the community itself is most uncertain, is a task that never has yet and never will be accomplished. If the Hindoo laws are unchanged and unchangeable, it is because the Hindoo himself has not changed and does not wish to change his opinions and ideas nor the actions which flow from them. When, if ever, we reach that stage the question of certainty and justice will become academic.

It is the uncertainty of public opinion, class conflicts, contending theories of the function of the state that have finally led many honest reformers as well as mere demagogues to question the value of our present constitutional system.

II

THE CHALLENGE TO THE CONSTITUTION

AFTER a century of veneration and a civil war waged to maintain it, our constitutional structure in many, if not in all of its parts, is challenged from various quarters. The shock that the attacks of the Democratic Platform and leaders gave to a great portion of the nation in 1896, by their criticism of the federal Judiciary and the Income Tax decision, is past history. No such sensitiveness is now generally prevalent. The public is quite blasé even to attacks far more radical, and it is idle to reply by the adducing of sentimental considerations. Von Holst has said that the veneration so rapidly developed among Americans for the Constitution was an extraordinary phenomenon since that instrument had been in fact a resultant of compromise with which none of the framers had been satisfied. Von Holst's attitude leaves out of consideration that ever present phase of national psychology which requires some object about which a people's sentiments may gather if the nation is to

be strong and homogeneous. If the original strength of the Constitution was at the outset in its merits, its maintenance was owing to its having become the subject of a cherished tradition based upon sentiment rather than reason. That this sentiment has greatly declined during the last fifteen years it is impossible to deny. There is a growing belief, shared by persons of all grades of intelligence, that the system as developed is, in part at least, outworn, that its basic principle that all laws declared contrary thereto by the courts are void, has become a weapon of the strong against the weak, the intrenchment of oligarchy, not the bulwark of popular freedom.

It has not been my purpose in this chapter to examine into the truth of these charges or the causes which have led to a belief in their wide acceptance. I would, in passing, merely point out that even conceding their substantial truth *arguendo,* it does not at all follow that the most important feature of our constitutional system must be eliminated nor even, indeed, emasculated. That system is based upon one cardinal doctrine which every thinking man must either reject or accept. Any middle position is intellectually indefensible, and the popular leader who tries the straddle must sooner or later be found out. The doctrine is simple but far reaching. As applied to the national government

it is this: The nation in the most careful, solemn and deliberate fashion established a governmental system distributing power between the states and the general government and, moreover, embodied therein a series of safeguards for individual liberty which the great mass of the nation at that time believed to be the resultants of human wisdom as applied to government. The written instrument in which these results are embodied was the Constitution, but these liberties, so specially safeguarded, rested themselves upon the deepest traditions of English speaking people. The Constitution was not, however, looked upon as in itself *sacrosanct* or unchangeable, and careful provision was made for amendment; that this provision should be modified in the direction of facilitating amendment is quite possible, and furnishes fair subject for debate. The recent ratification of the Income Tax Amendment proves that the provision is workable even though slow. A constitution which furnishes no provision for amendment merely leaves to the ultimate sovereign the determination of the moment at which constitutional changes are to be made by *extra*-constitutional or *non*-legal methods.

One difficulty in the current discussion of constitutional problems has been to find out the exact attitude of the critics. Few, if any, admit that they are opposed to a written constitution for the nation

or even for the states. The gist of the agitation seems to be mainly directed against the attitude of the courts toward certain legislation of a reformatory character, and little or no distinction is attempted between the merits of the system itself and its alleged distortion by "fossilized" judges. A very few of the more logical minded among these critics maintain that "the judicial oligarchy" should be done away with and the functions of the court as an interpreter of the Constitution abolished. The written constitution would then become merely a moral limitation upon the legislature, but the individual could claim no legal right thereunder, save the right of revolution.

The majority of critics, however, profess to believe "in our constitutional system," but feel that the judges have, by interpretation, warped the meaning of some of its clauses, mainly that prescribing that "no one shall be deprived of property without due process of law," in favor of the rich and powerful to the detriment of the weak and humble. In proof of this, certain decisions of the United States Supreme Court and of various state courts are adduced. These cases have given rise to much debate and I purpose to discuss some of them hereafter. My present thesis is that even conceding all of these decisions to have been erroneous in that they have placed upon "the due process" clause an

interpretation unnecessarily favorable to property, yet it is impossible to say with certainty that the intention of the framers of either the federal or state constitutions was to prohibit workmen's compensation laws limiting hours of labor or other like reformatory industrial legislation. Such legislation was not in fact and could not have been foreseen, and what the worthy fathers would have thought, had they divined modern industrial development must ever remain a subject for conjecture. My own belief is that they would have divided on the wisdom of our modern measures as they did on so many questions.

That there is room for difference of opinion is manifest. Personally, I incline to think the federal and State courts generally, and perhaps in some few instances the Supreme Court, have taken an overnarrow view, and that few, if any, of the advocated industrial reform and taxation measures need have been construed as contrary to the Constitution.

Were the constitutions unchangeable by normal prescribed methods, I could understand the agitation occasioned by these decisions; nor do I now deprecate their discussion. The acts of courts are no more immune from discussion and criticism than those of legislatures. It is academic to argue whether or no interpretation makes law. We know that in all the instances in which there is doubt as

to the applicability of a law to a given situation, some governmental power must exist to determine that question. The courts universally do so in the case of ordinary statutes and daily determine which of several apparently conflicting laws are applicable to the case at bar. In a conflict between a law and the Constitution, the function of the court is to decide between a lower and a higher law, i. e., one which expresses more adequately the real national or state will. This is no peculiarity of our system save as applied to the Constitution. State law may be declared void when in conflict with federal law or local ordinances where inconsistent with general State law. The English Privy Council frequently has to consider the validity of Canadian legislation in the light of the British North American Act, which is the paramount law for Canada, as it also does in the case of other colonies.

Those who are in favor of any written constitution at all must recognize this necessity. It may indeed be urged that the statute expresses a later popular view, and is in reality a more adequate expression of the national or State will than the Constitution, but this is not necessarily so and the constitutionalist may well reply that, in such event, the proper organ for the determination of what is really the popular will is the popular sovereign in his capacity as constitution maker or mender. The

state is not necessarily the government, and the framers intended to and did clearly distinguish between the two. It is this cardinal fundamental distinction so admirably and forcibly elucidated by Professor John W. Burgess, in his great work on Political Science and Constitutional Law, that both critics and defenders of the Constitution and the courts overlook or ignore.

The real distinction between those who believe in a written constitution—and they are, I conceive, still in large majority—and those who do not, consists not in their attitude toward certain much-criticized decisions, since an earnest constitutionalist may admit and deplore them as erroneous, but in their attitude toward the question of what constitutes the popular will.

Conservatives have fallen into the error of defending certain decisions rather than the constitutional system itself. If the majority of voting adults on a certain election day be considered as complete, adequate and final proof of the real national will, then a paper constitution requiring, for its change, months of discussion and a large majority of the electorate is a mere obstruction and should be swept away. I could understand the most vehement critics if they placed themselves fairly upon this ground, but I fail to understand the clamorous critics who do not take this view. If

their criticisms mean anything, they mean that constitutions must still stand as higher law, i. e., overriding ordinary statutes in case of conflict, but that they are now too difficult of amendment. This admits the wisdom of ascertaining the real popular will in two ways, one, the ordinary method of expression adequate to ordinary needs, but known to be defective as a fair register of a settled dominant opinion, and another method calculated more adequately to express and place on record the fundamental beliefs of the State or nation on matters deemed of maximum importance. If constitutional amendment becomes so easy as to be in effect little more than a statute, this fundamental distinction is abandoned.

A court cannot in fact determine a matter by merely applying the individual standards of its members. Law connotes rules, system, order. The acts of the Athenian Assembly were not laws. They were edicts or fiats *ad hoc*. The doctrine that a court must with rare exceptions follow some rule drawn by induction from a body of precedent is the settled basis of English and American jurisprudence and prevails in fact, if not so fully recognized in theory, in Continental Europe. Critics claim that the doctrine of *Stare Decisis* fastens upon this generation constitutional interpretations suitable only to a past age, but inadequate to our altered

and still rapidly changing civilization. I will endeavor to show that so far from this being generally true of the Supreme Court of the nation, in the instance of the right to jury trial, once a fundament of American law, the court has, through a series of decisions, dethroned that institution from its lofty place and reclassified it as a mere method of procedure. In so doing, the court certainly brought constitutional law into harmony with the more modern view of thinkers and with the present attitude of the public.

True, it may be claimed that in this instance the court went too far and that progress quite ran away from precedent. Many will charge that this is judicial legislation and usurpation, but the courts will always be subject to the criticism of either going too fast or too slow, depending upon the point of view of the critic. Some are all for precedent, others for progress. The fact is that in all cases of interpretation as to which men may fairly differ, and they are legion, it is impossible to satisfy even all honest-minded and intelligent critics. The only criterion as to whether the court was right from the standpoint of progress must be the view which will be taken of the decision hereafter. If the courts are wholly to disregard precedent in deciding upon the validity of statutes, then the court becomes a perpetual constitution maker—a very real judicial oli-

garchy. Yet the most virulent critics of courts as oligarchic are those who clamor for more liberal decisions, i. e., less in line with precedent. Should their views find acceptance, the judiciary would become in truth such an oligarchy.

The courts have indeed to find a middle way between precedent and progress or certainty and justice. No infallible method can be found to avoid this dilemma. Doubtless some courts have gone to one extreme, others to the other. I can only suggest that constitutional decisions be fairly and fully discussed and that where the highest courts cannot sustain legislation by fair reasoning and with due regard for that settled precedent without which law is differentiated from anarchy, then proper amendment be made to the Constitution.

The State constitutions are readily amendable. To make them more easily so would be to give to class opinion and the acts of minorities as to fundamental questions undue weight. Many changes in law are really brought about by minorities, and perhaps this is necessary to progress, as the mass may be difficult to arouse, but this should not be true of constitutional law if there be any distinction between that and statute law. When fundamental law is to be changed, it should not be the act of a minority, however wise, or however noisy, but a deliberate judgment of the whole state or

nation in which no class, however needy, or however powerful, can outweigh all the others together. This and nothing more is what we claim the present system is intended to and has substantially effected. How and in what respects the courts, in performing their great function of passing upon the constitutionality of statutes, have subjected themselves to just criticism will form the subject of the next chapter.

III

WHAT IS THE MATTER WITH THE LAW?

IT is evident that we are on the verge of important social changes following hard upon economic transformations. In fact, many of them are already at hand and have apparently taken us unaware; as a natural resultant we find a general dissatisfaction with the law as it stands to-day.

The ancient concept of law was that derived from absolute monarchy. Under the great Roman system, that which pleased the Prince had the force of law, and as the absolute monarchies of Continental Europe and of the Tudors and Stuarts of England grew up, this concept was revived and found useful. Blackstone's idea of the law is the command of sovereign power which must be obeyed by reason of the fact that it emanates from an absolute and uncontrollable source.

This idea was not substantially changed by the developments taking place in Europe subsequent to the French Revolution. The sovereign, while no longer conceived of as an actual person, was yet

personified as an abstraction, i. e., the state. In other words the place that had been occupied by Louis XIV was now occupied by the people collectively, conceived as represented in their national assemblies. This is still the reigning theory save as modified by systems of constitutional limitation.

In the hard domain of reality, however, law is the resultant of social life, and statutes imposed by any authority, in conflict with the settled habits, ideas or customs of a people, are practicably unenforcible. The law in order to become a rule of universal conduct must first have been to a great extent a general custom or must, at least, have had an ideal existence in a dominant public opinion.

Advances in the system of transportation, the growth of the great unified industries, the multiplication of books and periodicals have brought about a unity of thought and of methods among civilized peoples. The American nation cannot escape going through many of the social changes now operating in England, in Germany, in France and elsewhere. These changes are perhaps not as numerous as many think, but they are all in the direction of limiting the scope of freedom of contract and of individual liberty as understood at the time the Constitution was framed.

Our Constitution was originated by men imbued with the eighteenth century philosophy, which was

in turn the offspring of eighteenth century conditions. There is a radical difference between those who look upon society as founded upon certain basic, absolute principles, from which proper rules of conduct or law may at any time be deduced, and those who regard it as an ever changing development and adaptation.

I believe the old deductive system of political philosophy to be quite inadequate to the solution of modern problems; politics, economics, law, cannot be put into watertight compartments and treated separately. Principles applicable to one state of society may become inapplicable where there has been complete change of economic conditions, or such principles are of so vague a character as to have little real practical value as guides to action. The laws sufficient for a small western community may well permit a freedom on the part of the individual which in a crowded cosmopolitan city would lead to complete anarchy. Principles of so general a character as to include all cases and conditions are of little value as criteria for determining what the actual law of to-day should be. The more all-embracing they are, the less their relation to actual life.

Underlying all civilized government, however, are two concepts: private property and individual liberty. It is true that certain extremists would

207909

practically abrogate both, but such abrogation is so utterly impossible, without an unthinkable change in public opinion and general social conditions, as to make the question academic.

The practical difficulty is, however, that private property is a concept, the content of which is in some degree shifting. Slaves are no longer private property. Private property in the Spanish possessions included matters such as solicitors' offices, slaughter house franchises, etc., which the American law refuses to consider as property. Matters such as railway franchises, municipal gas plants, etc., that are now looked upon as private property, may in the future not be considered as falling within that category. Indeed, to-day there is a vast amount of property over which the rights of the individual are very much more restricted than those which he exercises over the house in which he may live. The property of a railroad is in a sense private property, but private property subjected to such a supervision on the part of the government that it is property in a very different sense from a man's house, his horse, or his carriage.

Old phrases become constantly invested with new meaning. The changes in economic conditions have given rise to a different, if not a new, political philosophy. The end of the eighteenth and the beginning of the nineteenth century saw the rise of

the great school of English utilitarians who found the greatest good of the greatest number to be the ultimate principle of conduct. From this they deduced the doctrine of *laissez-faire,* a doctrine which attributed to the state the rôle of mere policeman, while each individual was to be allowed to develop according to the best of his ability, and which was largely derived from biological analogies more fanciful and metaphysical than real or helpful. An extreme and logical statement of this doctrine was finally embodied by Herbert Spencer in "The Man v. The State," at a time when the doctrine itself had done its work and was beginning to be supplanted by a different political philosophy. Doubtless this school of thought had been useful in that it had destroyed an outworn economic system and had to a great extent, as Napoleon put it, "opened careers to talent," but it was found in time that the doctrine of the survival of the fittest had its disadvantages when applied to mankind.

The liberty which the utilitarian school hoped to assure by curtailing the power of government was quickly threatened by powerful individuals whose abilities and predatory instincts enabled them to obtain so large a proportion of private property, especially that kind which was developed by modern industrialism through the legal medium of corporations, that the less able and energetic part of hu-

manity found itself threatened with a serfdom perhaps more onerous than that of the old feudal days. Liberty tends to destroy equality.

The race was menaced with serious deterioration by reason of the work in factories and mines of women and children. Some thirty or more years ago it began to be seen that the freedom of contract between a great corporation and the needy laborer, who must work or starve, was a mere fiction of a bygone political science. It was a principle that had been useful under certain conditions, but had ceased to have any constructive value in new situations, and governments began to enact a series of reformatory legislation such as factory laws, checks upon monopoly, hygienic regulation, fixing of public utility rates, wholly incompatible with the doctrines of Bentham, Malthus, the elder Mill and finally of Spencer.

This latter political science was first formulated in France, where it often took extreme socialistic forms. It greatly influenced the later writings of John Stuart Mill and through him and others the writings of the English economists and philosophers. The orthodox political economy was seen to be working in a vacuum; it dealt with abstractions and not with realities. The theory that the workman, like a bale of cotton, would find his way into the highest market, where a penny a bale or a shil-

ling a day more for the one or the other might be obtained, was seen to be based upon pure abstraction. The individual man responds to causes which have nothing in common with those governing the question as to the ultimate destination of the ton of coal, but are sentimental rather than rationally financial, and thus the old orthodox political economy, once thought to be based upon the bed-rock of scientific truth, applicable at all times to all conditions, quietly passed into the realm of a historic theory which had served its purpose.

Nevertheless, these old theories have had a tremendous influence both upon legislators and upon courts, and to this day the older men generally in public positions will be found to adhere to the tenets of the famous Manchester school. It is perhaps as well that it should be so, because, while law must ultimately express the views of a dominant public opinion, each opinion is, to a great extent, neutralized by cross currents of opinion, and unless these cross currents are also to some extent represented, there is danger of much legislation that will be one-sided and unworkable.

In the United States, the serious legislative changes mentioned have come somewhat later than elsewhere because of the extension of our territory, the sparseness of population compared to the width of our domain, and the enterprising, active spirit of

our people which made the *laissez-faire* doctrine particularly appropriate, the encroachments of the government on individual autonomy peculiarly distasteful. These conditions within the last quarter of a century have radically changed. The public lands have been filled up; great communities have grown on what was once the buffalo feeding grounds; the prairie has become an aggregate of towns and cities, and the simple code of the ranchman has been replaced by a series of municipal ordinances regulating everything from the discharge of sewage to the beating of carpets.

There have come and are coming vast hordes of immigrants from Europe, bringing with them a somewhat different mentality, accustomed to coagulate in cities and averse to productive labor on the farm. The general universal movement from the country to the cities has been taking place owing again to the tremendous changes in transportation facilities and in business methods. The great increase in gold and the rise in property values, generally due to the opening up of the continent to agriculture and commerce, have led to the formation of enormous aggregates of capital, to a great extent controlling the markets and breaking down the old system of competition. Competition as a natural and beneficial regulator of prices has suffered a severe check. It is found practically impossible

to compete with the concern dealing with a hundred or more millions of dollars and able to depress a market at will by selling under cost.

The railroads have been put under government supervision in order that the great arteries of commerce may be kept free, on equal terms to all. Some further regulation of the capitalistic monopolies dealing with the necessaries of life are now contemplated. The old monopoly laws, long fallen into desuetude, have been in the last ten years put again into active operation with a considerable disruption to business and doubtful corresponding benefit to the public. Additional restraints looking to the moralization of competitive methods by the elimination of unfair practices are proposed and should, I believe, prove of advantage.

In this hurly-burly of American economic and social life, it is evident that there is need for an intelligent programme of reformative and regulative legislation which shall restrain abuse but maintain the incentive to individual effort. Such legislation has to a great extent been enacted in France, in Germany and in England. In America we have made a beginning. We have factory laws, limitation upon hours of labor in certain classes of work, workmen's compensation acts and various laws attempting to regulate monopoly. Yet we in the United States are met with an apparent impediment

not found elsewhere. Both our federal and State constitutions have enacted general restrictions upon the power of the legislatures and in favor of the liberty of the individual. As to the State constitutions, owing to the facility with which they may be amended, these restrictions will not for any great length of time interfere with the enactment into law of generally desired social reform.

With the Constitution of the United States, however, the question is different. The Constitution is very difficult of amendment. It has really never been amended, save in the present instance of the Income Tax, except as the result of the civil war; the first ten amendments were practically synchronous with the Constitution, and the eleventh amendment, the result of the decision of the Supreme Court in *Chisholm v. Georgia,* came about in response to a unanimous popular sentiment that the States should not be suable at the instance of an individual. In that case, however, the popular sentiment was less enlightened and far-seeing than the view of the court. That eminent authority and thinker, Professor Dicey, says of amending the Constitution of the United States:

"The sovereign of the United States has been roused to serious action but once during the course of ninety years. It needed the thunder of the civil war to break his repose and it may be doubted

whether anything short of impending revolution will ever again rouse him to activity. But a Monarch who slumbers for years is like a Monarch who does not exist. A federal constitution is capable of change but for all that a federal constitution is apt to be unchangeable."

Again in the United States we have, owing to our written Constitution and the consequent necessity for interpretation, greatly developed the political function of the courts. Our courts have come to exercise a real control over legislative action and may, through their power of interpreting the Constitution either narrowly or broadly, determine whether or not social reform legislation shall be enacted into valid law.

It is for this reason that the question of the attitude of the courts towards industrial liberty and social reform generally has become one of the burning questions of the day. The restrictions upon the State legislatures and Congress in enacting these reforms are to be found mainly in the clause of the Fifth Amendment, prohibiting Congress from depriving any person of life, liberty or property without due process of law and the similar restrictions imposed by the Fourteenth Amendment upon the States. These phrases are broad and general. I do not think it the duty of the court to interpret them necessarily as they would probably have been

interpreted at the time they were enacted. A court should not only examine the circumstances and the conditions under which a law was passed or a constitution adopted, but should go further and give some attention to the changing conditions which could not have been foreseen at the time. As a great French jurist has said, general rules should be interpreted in a *"sens évolutif."* This view has been recognized by the Supreme Court of the United States, for we find in the well-known case of *Holden v. Hardy* (169 U. S. 366, at pp. 385-6) this philosophical and, it is submitted, essentially just observation of Mr. Justice Brown:

"An examination of both these classes of cases under the Fourteenth Amendment will demonstrate that, in passing upon the validity of State legislation under that amendment, this court has not failed to recognize the fact that the law is, to a certain extent, a progressive science; that in some of the states methods of procedure, *which at the time the constitution was adopted were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been found to be no longer necessary;* that restrictions which had formerly been laid upon the conduct of individuals, or of classes of individuals had proved detrimental to their interests; while upon the other hand, certain other classes of persons, particularly those engaged in dangerous or unhealthy employments, have been found to be in need of additional protection."

I feel that it may be necessary when the court is dealing with constitutional questions to take a broader view of the doctrine of *Stare Decisis* than should be done in ordinary cases. In dealing with ordinary legal rules, changeable at the will of the legislator, the necessity of a considerable degree of certainty for the protection of business and property is obvious, but that the rule may be carried too far we have elsewhere shown.

Nothing can better illustrate than the history of the famous Sherman Anti-Trust Law the difficulties of interpretation. This short act, simple in its language, containing very few sections, has given rise to twenty years of perplexity in and out of court and been a threatening factor in business progress and development. The court has been attacked both by reactionaries and radicals as having interpreted the statute too broadly or too narrowly and there is a general, widespread opinion that the court in the recent Standard Oil case[1] reversed its earlier rulings. I will examine, in a succeeding chapter, the attitude of the Supreme Court on this question somewhat in detail.

In England and in Continental Europe for the past fifteen years a body of legislation having to do with accidents to workmen in various employments has been in existence. The prevailing theory there

[1] 221 U. S. Rep., 1.

as here was that of freedom of contract. The employee who desired to contract with an employer did so at his own risk. He was subject in case of accident to three rules:

(a) Assumption of risk,
(b) Contributory negligence,
(c) The fellow-servant rule.

These three rules did not contain in themselves anything particularly arbitrary or anomalous. They were worked out by the English court on the analogy of rules of law governing other legal relations.[1]

It is absurd to say that these doctrines were due to class bias on the part of the judges. It might, however, be a fair analysis of the situation to consider them as having followed naturally enough from the dominant political philosophy of the time which governed to a great extent the prevailing thought both in and out of courts. The employer and the employee were assumed to meet upon a field of equality and to make such contracts as their respective interests dictated. If there was special risk in the employment, the employee need not assume it but might seek employment elsewhere. He was in theory master of his labor and could sell

[1] See an admirable article in *Columbia Law Review* of February, 1911, by Professor Burdick.

it where he chose. If he had himself so contributed to the accident that without his negligence it would not have happened, he had no right to complain, as he should have exercised due and proper care in order to hold his employer liable. Nor was he supposed to be unjustly treated if injured by a fellow-employee. The fellow-employee would himself be liable and this danger of injury by a fellow servant the workman was assumed to have taken upon himself, and it was thought that the employer could be under no duty to insure against such danger.

But with the development of the factory system, the growth of dangerous trades, the multiplication of machinery, and the growing economic inequality between classes, it would seem that the employer and the employee were not upon a basis of equality; that the workman who depended for his daily bread upon his daily work must assume practically any risk, and that in the multiplication and complexity of machinery, a certain number of accidents were practically unavoidable. It was felt that these accidents should be at the risk of the business generally. The theory of workmen's compensation laws is well stated by Judge Werner in the opinion in *Ives v. South Buffalo Ry. Co.* (201 N. Y. 271), in declaring unconstitutional the workmen's compensation law of that state.

"There can be no doubt as to the theory of this law. It is based upon the proposition that the inherent risks of an employment should in justice be placed upon the shoulders of an employer, who can protect himself against any loss by insurance and by such an addition to the price of his wares as to cast the burden ultimately upon the consumer; that indemnity to an injured employee should be as much a charge upon the business as the cost of replacing or repairing disabled or defective machinery, appliances or tools; that, under our present system, the loss falls immediately upon the employee who is almost invariably unable to bear it, and ultimately upon the community which is taxed for the support of the indigent; and that our present system is uncertain, unscientific and wasteful, and fosters a spirit of antagonism between employer and employee which it is to the interest of the state to remove. We have already admitted the strength of this appeal to a recognized and widely prevalent sentiment, but we think it is an appeal which must be made to the people and not to the courts."

In the State of New York it is true that the people may, without great difficulty, so amend their constitution as to remove this inhibition and so modify the due process of law clause of the constitution as not to interfere with the enactment of laws for workmen's compensation. Several such amendments are now pending. But as far as federal laws are con-

cerned governing the employees in the great interstate enterprises the situation is a different one because of the applicability of the Federal Constitution. Therefore, the decision of the Supreme Court of the United States in the so-called Employers Liability cases was awaited with great interest.[1] The law there sustained as constitutional differs in theory from the workmen's compensation acts. It does no more than abolish the fellow servant rule, the doctrine of the assumption of risk and modify the common law rule of contributory negligence so that the damage to the workman in the case of his negligence, unless it were wanton, is proportioned to the degree in which he contributed to the accident. The employer is not forced to bear the loss wholly independent of his own fault, and thus become an insurer pure and simple. There is a radical difference between the two systems.

The New York Court of Appeals has held that to cast this burden of insurance upon the employer was practically to deprive him of property without due process of law, as no legal liability could be created in the absence of contract unless there existed some fault, and that to create such a one-sided obligation was practically *pro tanto* expropriatory. There is consequently no necessary conflict between the decisions of the Supreme Court of

[1] Second Employers' Liability Cases, 223 U. S., 1.

the United States and that of the State of New York.

It is probable, however, that in the near future a workmen's compensation act proper will come before the Supreme Court, in which event it is quite possible that it may reach a decision contrary to that arrived at by the New York Court of Appeals and in conformity with that reached by the courts in the State of Iowa, the State of Washington, and in some of the other States. The views of the Court of Appeals, if unsound, seem to me, attackable on economic rather than merely legal grounds. If the court had realized that the new charge was one on the business as such, analogous to statutory safety device requirements, and consequently shiftable to the consumer, the conclusion that it constituted a taking of property rather than a regulation within the police power, might not have followed.

We must also remember that the Court of Appeals was interpreting the same phrase both in the State constitution and in the Constitution of the United States, and that while a constitutional amendment could obviate the consequences of its decision as regards the State constitution its ruling as to the due process clause in the Constitution of the United States would remain unaffected. Unfortunately, by reason of our rules as to appeal, no appeal can be

taken to the Supreme Court of the United States from a ruling of a State court sustaining the constitutionality of a law, so that it is impossible to know when this question will be tested. If the Supreme Court of the United States should hold these workmen's compensation acts unconstitutional the nation would find itself unable, save through the process of amendment, to enact a generally demanded reform and one which has been in force in highly civilized nations for some years past. The Supreme Court may see its way clear to the avoidance of such a result by interpreting the general phrase "property and due process of law" in view of modern economic conditions and treat it in the same broad spirit as they have done in the cases affecting the constitutional right to jury trial hereinafter examined.

Other instances of the attitude of the Supreme Court in regard to labor regulation may be found in such cases as *Lochner v. New York,*[1] in which it was held by a divided court (five to four) that the New York law restricting the hours of work in a bakeshop to ten hours a day was unconstitutional as unreasonably interfering with that liberty of contract guaranteed by the Constitution in the right to pursue life, liberty and happiness. As Mr. Justice Peckham, writing for the majority of the court, said:

[1] 198 U. S., 45.

"It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to and no such substantial effect upon the health of the employee as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employee (all being men, *sui juris*), in a private business, not dangerous in any degree to morals or in any real and substantial degree, to the health of the employees. Under such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution."

This decision has been criticized as interfering with the power of the States to enact needed social reforms. It was strongly dissented from in an able opinion by Justices Harlan and Holmes, arguing that this fell well within the police power of the State which could enact laws for the public health and the general welfare, although they might in themselves interfere with liberty of contract. As Mr. Justice Harlan well says:

"We are reminded by counsel that it is the solemn duty of the courts in cases before them to

guard the constitutional rights of the citizen against merely arbitrary power. That is unquestionably true. But it is equally true—indeed, the public interests imperatively demand—that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of fundamental law of the constitution."

And Mr. Justice Holmes, putting the matter in startlingly concrete fashion, says:

"This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that State constitutions and State laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. * * * But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizens to the State or of *laissez-faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and

even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."

Here again we have the eternal conflict between justice, that is to say the general sense of what is thought to be right in a community, and the necessity for certainty in the law. There are some dynamic forces ever working for change, and between such forces and those which tend to stability and conservatism there must be endless conflict. The result is in compromise. If one or the other of these forces becomes dominant we have either anarchy or stagnation; a Chinese system or troubled years of revolution. Social, like philosophic truth, is ever in the making, and modern states are ever moving toward new adjustments and more adequate solutions.

It would be unfortunate if the courts by a narrow interpretation of general constitutional clauses should seem effectually to delay widely desired reforms. If this is done there is grave danger that our constitutional system, which has worked admirably so far and which has been the result of profound genius on the part of the American people, will be disrupted.

It is, nevertheless, I think, of capital importance that the courts should retain the power to set aside acts of the legislature. The true test of good gov-

ernment is whether it adequately protects the rights of minorities. This has been well instanced in other lands by religious persecutions, both ancient and modern, whenever events have placed the minority at the mercy of the majority, leading to cruel repression of opinion, greatly retarding human progress and development. No better test of freedom exists than the legal protection afforded to minorities. Such protection is of modern growth and confined to small areas. It is impossible to protect the rights of minorities unless there be courts to which an appeal may be taken from the doubtful legislation of the moment.

Many of the State courts have, I think, been over conservative and are largely responsible for the feeling that has been created against the judiciary as the representatives of capitalistic and conservative forces. But the Supreme Court of the United States, with few exceptions, has been liberal, recognizing that re-adjustment is not necessarily revolution. It has recognized since the decision of the Dred Scott case that great moral and economic forces cannot be overcome by the mere *fiat* of a court, however dignified its functions or however eminent its personnel.

The changes contemplated in our law by present public opinion are not in any way subversive of our system. They are compatible with the highest civil-

ization and a great degree of personal liberty, as English, French and German experience have shown. I firmly believe that the benefits of our system may be retained by relaxing somewhat the rigidity of the rule of *Stare Decisis* in the settlement of constitutional questions and by fully recognizing, as many of our judges have thought should be done, the modified conditions to which the constitutional provisions must now apply. Fortunately the federal Constitution deals in broad and general propositions and there are few if any social reforms of so radical a character that any clause of the Constitution may be found which expressly and in terms inhibits them.

Liberty and property may well be preserved, although some of the incidents which went with them in the past may be no longer indispensable to their preservation. As illustrative of this we will in the next chapter sketch the judicial views of jury trial as a method once considered an essential bulwark of liberty, but now become merely a historic, though still useful, incident in the preservation of freedom.

IV

JURY TRIAL AS AN INSTANCE OF CONSTITUTIONAL DEVELOPMENT

THIS general tendency, by which the Constitution is being constantly brought by the Supreme Court *en rapport* with existing ideas, is no where, I believe, so well instanced as in the evolution of jury trial from a fundamental right into a mere method of procedure.

The proposition which, I believe, can be established by the examination of the cases on this subject in the Supreme Court of the United States, is this:

A right secured to the people by the Constitution in most positive language, treated by the Fathers, by the original State constitutions, and by the public opinion of the time as a sacred and fundamental right, has in the course of a hundred years by judicial decision been relegated to the rank of a mere method of procedure.

This important change has been accomplished without any formal amendment to the Constitution,

but wholly under the guise of judicial interpretation. It has not been brought about on any theory that the language of the Constitution was ambiguous, but because the court considered that, law being a "progressive science," the opinions and conditions of to-day should be considered an important element in interpreting the intention of the framers.

In stating this proposition, I do not wish to seem in any way to criticize that great tribunal. What I believe we should do is to examine quite dispassionately the process by which our constitutional law is developed and expanded, just as the chemist analyzes the properties of the substance in his crucible. He does so, or should do so if he hopes to succeed, without prejudice, passion or preconceived theory, solely with a view to ascertaining the chemical resultant of his combinations.

As Dr. Johnson says: "Let us rid ourselves of cant"; let us not do one thing and say another; let us not act upon the theory that the Constitution is as unchangeable as the law of the Medes and the Persians, when it is being constantly changed by judicial interpretation, in many respects quite as effectually and much more easily than it could be by amendment in the prescribed form.

Nowhere has this been more clearly stated than in the utterances of the court itself; in speaking of

the opinion in *Murray's Lessee v. Hoboken,* Mr. Justice Matthews said:[1]

"The point in the case cited rose in reference to a summary proceeding, questioned on that account as not due process of law. The answer was: however exceptional it may be as tested by definitions and principles of ordinary procedure, nevertheless, this, in substance, has been immemorially the actual law of the land, and, therefore, is due process of law. But to hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. *It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.*"

That the law must change with the development of civilization is plain; the doubt arises as to how far fundamental institutions should be modified or abrogated by the courts rather than in the constitutionally prescribed way.

That such a method of virtual amendment by judicial interpretation has been found, reflects credit upon the political ability of our people. Loose thinking has generally been characteristic of English and American lawyers; while they have usually possessed sound common sense and enlight-

[1] *Hurtado v. California,* 110 U. S., 516.

ened views of justice, they have proceeded without much concern about legal theory or careful analysis of what was really taking place in the domain of legal development. Hence, vast changes have been brought about in the common law while the bar was still insisting that the law, as it was in the time of Henry II. or Edward I., had not suffered material modification.

Fiction is necessary to progress, so deep rooted is the natural aversion of man to change. Nor is its utility confined to primitive law as Sir Henry Maine seems to indicate; rather does it seem to be an ingrained mental tendency.

"The successful achievement of innovation without revolution depends mainly upon an artifice which derives its vitality from one of the most deep-seated tendencies of the human mind and which has unquestionably been one of the chief agencies in forwarding social progress. I refer to the artifice of 'legal fiction' as shown in the pretense that the novelty of belief or practice just inaugurated has its warrant in time-honored precedent. * * * It is this which enables changes to be made 'constitutionally' or in accordance with a system of ethics framed in an age when the changes in question could not possibly have been contemplated or provided for." (Fiske, Cosmic Philosophy, Vol. II., pp. 279-80.)

The origin of the jury was long a much mooted question, but the researches of two great historians of the English law seem to have finally laid the question at rest.

Messrs. Pollock and Maitland in their epoch making book on the history of the English law tell us that:

"The English jury has been so highly prized by Englishmen, so often copied by foreigners, that its origin has been sought in many different directions. At the present day, however, there can be little doubt as to the quarter to which we ought to look. We must look to the Frankish *inquisitio,* the prerogative right of the Frankish kings."

As the Frankish Empire broke up, the Norman Dukes, modeling their smaller domain upon that of the great Empire of Charlemagne, retained the *inquisitio,* but there is an intervening period during which we know little of the jury. As the same authors say, speaking of that time:

"Then deep darkness settles down. When it lifts we see in the new states that have formed themselves no central power capable of wielding the old prerogative, for a long time to come; the sworn inquest of neighbors will not be an utterly unknown thing in France; it will only be finally overwhelmed by the reception of the Roman canonical procedure. Even in Germany it will appear from time to time,

yet on the whole we may say that but for the conquest of England it would have perished and long ago have become a matter for the antiquary."

"Such is now the prevailing opinion and it has triumphed in this country over the natural disinclination of Englishmen to admit that this palladium of our liberties is in its origin not English but Frankish, not popular but royal."

The petit jury in something like its present form as well as the accusing or grand jury, became part of the ordinary mechanism of justice apparently about the reign of Henry II. (1154-1189) and they both appear, in something like their final form, about the middle of the twelfth century.

The jury while thus an ancient institution in Europe became peculiar to England, owing to a long train of historic causes which I do not now purpose to trace. It was regarded as one of the most important of our institutions at the time of the adoption of the National Constitution and was guaranteed by the constitutions of every one of the original States.

The views entertained of the Grand Jury in this country are well set out by Mr. Justice Field in a charge to a grand jury quoted with approval by that great judge, Mr. Justice Miller, in the case of *Ex Parte Bain* (121 U. S., 1):

"'The institution of the grand jury,' he says 'is of very ancient origin in the history of England—it goes back many centuries. For a long period its powers were not clearly defined; and it would seem from the account of commentators on the laws of that country, that it was at first a body which not only accused, but which also tried, public offenders. However this may have been in its origin, it was at the time of the settlement of this country an informing and accusing tribunal only, without whose previous action no person charged with a felony could, except in certain special cases, be put upon his trial. And in the struggles which at times arose in England between the powers of a king and the rights of the subject, it often stood as a barrier against persecution in his name; until at length, it came to be regarded as an institution by which the subject was rendered secure against oppression from unfounded prosecutions of the crown. In this country, from the popular character of our institutions, there has seldom been any contest between the government and the citizen which required the existence of the grand jury as a protection against oppressive action of the government. Yet, the institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offences upon just grounds, but also as a means of protecting the citizen against unfounded accusations, whether it comes from government, or be prompted by partisan passion or private

enmity. No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district shall declare, upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial.'" (pp. 10-11.)

That the public opinion of the time, as well as the men who framed the Constitution, believed jury trial to be a fundamental right and no mere method of procedure is shown by the following extract from the great ordinance for the government of the Northwest Territory, passed by the Congress under the Confederation, and ratified by the first Congress under the Constitution. The language used is as follows:

"*And for extending the fundamental principles* of civil and religious liberty which form the basis whereon these Republics, their law and institutions are erected; to fix and establish those principles as the basis of all laws, constitutions and governments which forever hereafter shall be formed in the said territory, etc., it is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of compact between the original States and the people and States in the said territory and forever remain unalterable, unless by common consent, to wit:

"ART. 1. No person demeaning himself in peaceable and ordinary manner, shall ever be molested on account of his mode of worship or religious sentiments in the said territory.

"ART. 2. The inhabitants of the said territory shall always be entitled to the benefits of the writ of *habeas corpus and of the trial by jury.*"

The Constitution of the United States provides, Article III., Section 1:

"The trial of all crimes except in cases of impeachment shall be by jury."

The Fifth and Sixth Amendments to the Constitution provide:

"That no person shall be held to answer for capital or otherwise infamous crime unless on a presentment or indictment of a grand jury."

And that in all criminal prosecutions:

"The accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed."

It has been held by a long line of authorities, both before and after the adoption of the Fourteenth Amendment, that the so-called Bill of Rights contained in the first eight amendments to the Consti-

tution applied only to the federal government and did not limit the power of the States.

This was due to the fact that at the time of the adoption of the Constitution it was fear of the general government and its possible encroachments upon individual liberty that caused apprehension among the people of the States. Their aim was to establish a government which, though strong, would yet not encroach upon the liberties which the colonists believed, by reason of the course of English history, to be essential to their happiness and prosperity. (*Barron v. Baltimore,* 7 Pet., 243.)

The States were looked upon as the guarantors of the liberty of their own citizens and the "Bill of Rights" was not intended to run against the action of the States. A State could even abridge the freedom of religion.

The case of *Permoli v. New Orleans* (3 How., 589) (1845), holds that the first amendment as to freedom of religion does not apply to the action of the States. Under the reasoning of the Hurtado and Maxwell cases this might be true even since the enactment of the Fourteenth Amendment.

A statute of New Orleans passed in pursuance of authorization by the state legislature, forbade a performance of funeral rites in any save one building in New Orleans. A deceased person was brought to a Catholic Church and the ordinary funeral rites

there performed. The parish priest in charge was punished for a violation of the ordinance and the case came to the Supreme Court of the United States on a writ of error on the ground that the ordinance was in violation of the First Amendment of the Constitution as well as of the act admitting Louisiana to statehood. The answer made by the court was as follows:

"The Constitution makes no provision for protecting the citizens of the respective States in their religious liberties; this is left to the State constitutions and laws; nor is there any inhibition imposed by the Constitution of the United States in this respect on the States." (p. 609.)

The Constitution deals with practical and tangible rights and does not indulge in any philosophic generalizations and in this largely lies the secret of its success.

Take, for instance, the amendments *seriatim*.

The first article provides that there shall be no established religion. It was because of "an establishment of religion" in England and the persecution of dissenters therefrom that the founders of Massachusetts and numerous other colonies had left the mother country. No vague theory of natural rights dominated the framers, and the fact that there were so many adherents of various denominations among the American people made it impos-

sible that any one religion should be established and this rendered it easy to acquiesce in a constitution which protected all alike. The principle of toleration was the outgrowth of a practical situation rather than the result of liberal philosophy or religious indifferentism.

The abridging of freedom of speech or of the press, likewise referred to a long struggle with the English Crown, as did the right of the people to assemble and petition the government for a redress of grievances which we find contained in the Petition of Rights and embodied in the Bill of Rights more than one hundred years before Rousseau.

The second article providing for a well-regulated militia, bore witness to the constitutional dislike of English people for a standing army, a natural result of the long conflict with the Stuart Kings; and the right of the people to bear arms was a tacit tribute to the view that in case of necessity other protection than that of a constitution might prove a necessary resort.

The prohibition in the third article against the quartering of soldiers in any house is traceable to the practice of the Monarchy before 1688, rightly so unpopular in England.

The fourth article is a direct outcome of that long agitation which culminated in the celebrated Wilkes case, in which the English courts, sustaining

Wilkes, held general warrants and seizures illegal. The doctrine of *Entick v. Carrington and Three King's Messengers,* enunciated so boldly by Lord Camden as a canon of English liberty, became imbedded in the Constitution as a protection, so the framers thought, for all future time to the people of the states against the possible tyranny of the central government. (*Boyd v. United States,* 116 U. S., 616.)

The fifth and sixth articles, as well as the seventh, providing for jury trials in civil cases, were considered upon a par with the other great rights, and as those three amendments occupy almost as much space in the eight amendments constituting the so-called "Bill of Rights" as the others put together, it would seem that the framers did not consider that they occupied a comparatively subsidiary position and dealt merely with matters of procedure. The Supreme Court at this day takes a very different view as we will now see.

That grand and petit juries as understood at the common law are essential in federal courts has never been questioned (*Ex parte Bain, supra*). That they are necessary in all our territories, acquired previous to 1898, has also been judicially determined.

The cases of *Thompson v. Utah* (170 U. S., 343) and *American Publishing Co. v. Fisher* (166 U. S., 464) as well as *Springville v. Thomas* (166 U. S.,

707) are authority for the proposition that a territorial legislature in Utah could not abolish jury trial, a right secured by the Constitution to every person against the action of the federal government.

These cases have been somewhat refined away in the Insular cases by the suggestion in Mr. Justice Brown's opinion (*Downs v. Bidwell,* 182 U. S., 244), that the Constitution had been enacted into Utah Territory by legislation and hence was only there by force of statute, thus leaving open the question of the power of Congress under the Constitution in territory outside the states.

Hurtado v. California (*supra*) involved the validity of a section of the constitution of California, providing for prosecution by information in place of the common law method of indictment in cases of infamous crime. In the Supreme Court the prisoner claimed that under the Fourteenth Amendment he was entitled to due process of law, and that due process of law involved indictment by grand jury.

The court held (Mr. Justice Harlan dissenting), that due process of law did not necessarily involve indictment by grand jury. Mr. Justice Matthews, writing for the court, went into the historic evidence as to the origin of juries and came to the conclusion that the phrase "Due Process of Law," or

its equivalent in English institutional history, "The Law of the Land," did not include indictment in capital cases.

Yet, whatever may have been the fact at the time Magna Charta was wrung from King John whether "judgment of his peers" (*Judicium parium*) meant what jury trial now does, or, as the more modern historians believe, referred to the then Court of Exchequer, it does appear altogether clear that, at the time of the ratification of the Constitution, due process of law in capital cases necessarily involved jury trial.

By going back to the beginnings of history, a time will be reached when almost any one of our present institutions is found in the mere germ and would seem, except perhaps to the antiquary, wholly unrecognizable. Due process of law once involved maiming, torturing, the ordeal by fire and water, the *peine forte et dure* and the other processes which we now look upon as barbarous and shocking, but the question which would seem to have been presented in *Hurtado v. California*, was what the phrase, "Due Process of Law," meant at the time of the ratification of the Constitution, or perhaps what it meant at the time of the passage of the Fourteenth Amendment. *Weems v. United States* (217 U. S., 349).

It seems to us that Mr. Justice Matthews, in

going back to primitive law, is in conflict with the view propounded in *Thompson v. Utah* (170 U. S., 343). In the latter case, jury trial, the court assumed to have been essential from the time of Magna Charta, and while this may historically be open to question, nevertheless, the decision of the court in that case was based upon the proposition that it was deemed fundamental *at the time of the ratification of the Constitution.*

It would seem that the decision in *Hurtado v. California* was really due to the fact that a century of legal development had changed American public opinion upon the subject of the jury. This appears forcibly in the case of *Maxwell v. Dow* (176 U. S., 581), a later case of the highest importance. There the same question was presented as in *Hurtado v. California,* together with a further one arising from the fact that the trial had been by a jury of eight under the California constitution and law. An argument not urged or pressed by counsel in the Hurtado case was here advanced and fully considered by the court. Counsel for the prisoner claimed that the Fourteenth Amendment providing that no state shall abridge any of the rights, privileges or immunities of a citizen of the United States, guaranteed to every citizen jury trial. His claim was in effect that the first eight amendments to the Constitution enumerated fundamental rights

of an American citizen which no State could abridge.

The court thought otherwise, holding that the eight amendments, after the ratification of the Fourteenth Amendment had no greater scope than before and were still solely directed against the action of the federal government. The Fourteenth Amendment, not having made them applicable to the action of the States, while it was difficult to enumerate just what the rights and immunities of an American citizen were, jury trial, and indictment by grand jury were not included among them.

This was indeed a momentous decision.

The Fourteenth Amendment according to this view did not attempt to enlarge the existing rights and immunities of American citizens, but at most merely protected existing rights and immunities against the State governments. What were these rights and how should they be determined? If they were not contained in the first eight amendments, where did the Constitution provide for them? These rights and immunities are not enumerated in nor conferred by any clause of the Constitution except in so far as they may be conferred in the clause providing:

"Art. 4, Sec. 2. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

It was pointed out by counsel in the Maxwell case that the debates in Congress evidenced the intention of the framers of the amendment to confer upon the citizen of the State all the rights contained in the eight amendments. Had this view been adopted it would have gone far toward nationalizing the domain of civil liberty, as was the evident intent of the framers of the amendment, but the fact that the court took a different view would seem to have rendered that portion of the amendment virtually meaningless.

If the privileges and immunities of citizens of the United States have been in no way increased by the amendment, it is hard to see what benefit such citizens have received. The rights and privileges which they enjoyed already under the Constitution were protected as well before as after the Fourteenth Amendment; unless they were to receive some advantage from this clause, why should it have been inserted?

Was it merely declaratory?

It certainly did not seem so to the people of the United States at the time of its enactment. Could they have supposed it meant so little they would scarcely have treated the matter so seriously.

The fact would seem to be that the decision in those two cases was largely due to the reaction against the national and centralizing tendencies of

the civil war and the years immediately following. Did not the court feel that this portion at least of the amendment did not represent the real opinion of the people? Did not the view of the court rather represent the calm afterthought of the American public than that of the framers of the amendment itself?

It is apparent that the court took a different view from that of the framers of the Fourteenth Amendment as to a pure question of political science. The question was, whether civil liberty should for its sanction depend mainly upon the State or upon the federal government. What the framers of the instrument almost certainly intended to do was to withdraw the essentials of liberty, or what they deemed such, from possible invasion by the State governments and to place them under the protection of the national government. The court evidently believed that such a course would have been unwise, if not positively revolutionary.

The reasoning in these cases is based upon the dictum of Mr. Justice Miller in the *Slaughter House Cases* (16 Wall., 36).

"Was it the purpose of the Fourteenth Amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of *citizens of the United*

States, to transfer the security and protection of all the civil rights, which we have mentioned, from the states to the federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States? * * * *The argument we admit is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress in the exercise of power heretofore universally conceded to them of the most ordinary and fundamental character; when, in fact, it radically changes the whole theory of the relations of the State and federal governments to each other and of both these governments to the people; the argument has a force that is irresistible in the absence of language which expresses such a purpose too clearly to admit of doubt.*

"We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them." (pp. 589-590.)

The court in *Maxwell v. Dow* (176 U. S., 581), after quoting the above, says:

"The definition of the words 'privileges and immunities,' as given by Mr. Justice Washington, was adopted in substance in *Paul v. Virginia,* 8 Wall., 168, 180, and in *Ward v. Maryland,* 12 Wall., 418, 430. These rights, it is said in the *Slaughter House Cases,* have always been held to be the class of *rights which the State governments were created to establish.*" (pp. 591-592.)

Yet if they were safe in the hands of the State governments why did the Fourteenth Amendment prescribe that no State should abridge them?

This leaves the question in a most anomalous condition. The rights referred to then would be the rights conferred by the States generally upon their own citizens. As the legislation is different in each State, their traditions and legal systems being in many cases entirely dissimilar, it would seem very difficult to define or enumerate these rights. Should Utah enact all the tenets of the Mormon religion into law obligatory on all, could the New Yorker sojourning in that State complain? He could not allege that he had been denied any privilege or immunity accorded to citizens of Utah.

The privilege and immunity clause of the Fourteenth Amendment as thus interpreted has created no new privileges or immunities. It may, however, be claimed that what the Fourteenth Amendment really meant to do, and this is probably what the

court intended to announce, was to protect from the interference of the State all those general rights which the States had accorded to the individual.

If this be the meaning of the Fourteenth Amendment as now interpreted, the court will have to determine the rights which it considers to be fundamental, and it could only reach this result by a process somewhat analogous to that used by the Roman lawyers in determining what rules and institutions belonged to the *jus gentium*. It would be necessary to discover those rights which all the States had at all times accorded to their citizens, solely because of their citizenship. Such rights the court apparently intends to designate when it speaks of fundamental rights. Under this view, the court is really empowered to determine what rights do and what rights do not belong to the category of fundamental rights, and in doing this they are exercising an extraordinary and almost unprecedented power.

It is obvious that all rights granted by the Constitution are protected by it. What rights, not created by the Constitution, are "secured" by it, it is impossible to state more definitely than we have already indicated.

"There is no intimation here that among the privileges or immunities of a citizen of the United States are the right of trial by jury in a state court

for a State offense and the right to be exempt from any trial for an infamous crime, unless upon presentment by a grand jury." (*Maxwell v. Dow*, 176 U. S., 581, 594.)

It would seem that had the intention of the framers of the Fourteenth Amendment been carried out by the court there would have been no such difficulty in discovering the "precise meaning of privileges and immunities."

The privileges and immunities of citizens of the United States should not be matters so difficult or "tedious" to define. The view that this phrase included the liberties enumerated in the Bill of Rights and that the Fourteenth Amendment intended to secure these great historic rights against all government, both state and national, would have left little ground for doubt or difficulty. Seventy years of experience had demonstrated that the danger to liberty came rather from the states than from the federal government. The framers of the amendment surely took this view, but the court evidently proceeded on another theory.

Such rights, in addition to those already secured against State action in the First Article of the Constitution would have made a formidable array of rights and immunities which every American citizen would have possessed, whereas under the present interpretation of the amendment it is im-

possible for him to know exactly what his rights are.

In both the Hurtado and Maxwell cases masterly dissenting opinions were written by Mr. Justice Harlan. These opinions are among the best written by that learned and experienced jurist. They make it clear that the decisions mentioned have repealed much of the Fourteenth Amendment.

Recent cases show that the States are as free from trammel by the Bill of Rights of the Federal Constitution to-day as they were before the amendment.

"The provision in reference to cruel and unusual punishments was taken from the well-known act of Parliament of 1688, entitled 'An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown,' in which after rehearsing various grounds of grievance, and among others, that 'excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects; and excessive fines have been imposed; and illegal and cruel punishments inflicted.' * * * Stat. 1 W. & M. c. 2. This Declaration of Rights had reference to the acts of the executive and judicial departments of the government of England; but the language in question as used in the constitution of the State of New York was intended particularly to operate upon the legislature of the State, to whose control the punishment of

crime was almost wholly confided. So that, if the punishment prescribed for an offense against the laws of the state were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition. *And we think this equally true of the Eighth Amendment, in its application to Congress."* (*In re Kemler,* 136 U. S., 436, at pp. 446, 447.)

How is it to be determined what rights are fundamental and what are not if the Constitution has not determined it? They must be questions to be determined by the court, and this substitutes the judgment of the court in each particular case, for the precise and clear language of the Constitution.

It seems to us that there is no escape from this inference; it is the only theory upon which the decision in *Maxwell v. Dow* can be explained. Such was the view that Mr. Justice Harlan took of the prevailing opinion, for he says:

"When our more immediate ancestors removed to America, they brought this privilege (jury trial) with them, as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power. It is now incorporated into all our state constitutions *as a fundamental right,* and the Constitution of the

United States would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms." (p. 610.)

The scope of the decision and its far reaching effect was clearly seen by Mr. Justice Harlan:

"Suppose the State of Utah should amend its constitution and make the Mormon religion the established religion of the state, to be supported by taxation on all the people of Utah. Could its right to do so, as far as the Constitution of the United States is concerned, be gainsaid under the principles of the opinion just delivered? If such an amendment were alleged to be invalid under the national Constitution, could not the opinion herein be cited as showing that the right to the free exercise of religion was not a privilege of a 'citizen of the United States' within the meaning of the Fourteenth Amendment? * * * There is no middle position, unless it be assumed to be one of the functions of the judiciary by an interpretation of the Constitution to mitigate or defeat what its members may deem the erroneous or unwise action of the people in adopting the Fourteenth Amendment. * * * The right to be tried when charged with crime, by a jury of twelve persons, is placed by the Constitution upon the same basis as the other rights specified in the first ten amendments. And while those amendments originally limited only the powers of the national government in respect of the priv-

ileges and immunities specified therein since the adoption of the Fourteenth Amendment those privileges and immunities are, in my opinion, also guarded against infringement by the states. * * *

"If some of the guarantees of life, liberty and property, which at the time of the adoption of the national Constitution were regarded as fundamental and as absolutely essential to the enjoyment of freedom, have, in the judgment of some, ceased to be of practical value, it is for the people of the United States so to declare by an amendment of that instrument. But, if I do not wholly misapprehend the scope and legal effect of the present decision, the Constitution of the United States does not stand in the way of any State striking down guarantees of life and liberty that English speaking people have for centuries regarded as vital to personal security, and which the men of the Revolutionary period universally claimed as the birthright of freedom." (pp. 616-617.)

This reasoning seems to be quite unanswerable. It emphasizes the fact that under the fiction of interpretation the court has actually changed the Constitution.

In the Hurtado and Maxwell cases the court had already indicated a belief that there were certain fundamental rights belonging to United States citizens, which rights were not necessarily contained

among the rights guaranteed to the individual by the Constitution.

The court in the Insular Cases clearly admitted the existence of this distinction, based upon the nature of the rights in themselves. The decision there did not turn on the question, so that the expression quoted below is a dictum.

Mr. Justice Brown (*Downes v. Bidwell,* 182 U. S., 244) uses the following significant language:

"There are certain principles of natural justice inherent in the Anglo-Saxon character which need no expression in constitutions or statutes to give them effect or to secure dependencies against legislation manifestly hostile to their real interests." (p. 280.)

"We suggest, without intending to decide, *that there may be a distinction between certain natural rights,* enforced in the Constitution by prohibitions against interference with them, *and what may be termed artificial or remedial rights, which are peculiar to our own system of jurisprudence.* Of the former class are the rights to one's own religious opinions and to a public expression of them or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law and to equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and un-

usual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship, to suffrage (*Minor v. Happersett,* 21 Wall. 162), and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the States to be unnecessary to the proper protection of individuals." (pp. 282-283.)

All of the rights which Mr. Justice Brown has spoken of as "natural rights," the court, as we have shown, holds the States may under the Constitution disregard, and their reasoning has not been based upon the distinction in the nature of the rights themselves, although incidental remarks may be found to that effect.

This passage when analyzed must be based upon one of two alternative theories:

(1) Either the natural rights spoken of by the learned Justice exist of themselves and wholly apart from the Constitution, deriving their sanction from a supposed law of nature and not from that instrument;

(2) or the language of the Constitution itself protecting those rights is so broad and imperative as to be of universal application to government action in the specific cases.

If the former be the proper interpretation of this interesting passage, the questions which would arise in regard to it would not present problems of constitutional law at all, but questions of political philosophy. If there are certain rights which are protected because they are assumed to belong to the category of "natural rights," the question in each case would be as to whether such rights were "natural" or not. If they were they would be protected because of their inherent character, and if they were not, they would either have to rely upon positive man-made law for their sanction, or else be unprotected by any law.

As almost every writer upon the subject has differed as to what natural rights are, his views usually expressing the general ideals of the particular time in which he happened to live, we must respectfully submit that any appeal to natural rights at this day must prove utterly futile.

Nor do we at all believe that the learned Justice meant that certain rights were to be protected independently of constitutional and positive law simply because they were "natural." We incline to think the true meaning of the passage to be that the positive prohibitions against all action upon the part of Congress in certain cases were intended for the protection of what were deemed natural rights, and that consequently some at least of that vague body

of philosophic doctrine has been transplanted into the domain of positive law and given the dignity of constitutional adoption by being placed in the first eight amendments to the Constitution. Therefore, we suggest, Mr. Justice Brown must refer to the same rights which he mentions in the following passage:

"To sustain the judgment in the case under consideration, it by no means becomes necessary to show that none of the articles of the Constitution apply to the island of Porto Rico. There is a clear distinction between *such prohibitions as go to the very root of the power of Congress to act at all,* irrespective of time or place, and such as are operative only throughout the United States or among the several states." (*Downes Case,* pp. 276-277.)

This seems likewise to be the thought of Mr. Justice White in the same case, for he says:

"Undoubtedly there are general prohibitions in the constitution in favor of the liberty and property of the citizen which are not mere regulations *as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions to do particular acts.*" (*Downes Case,* 182 U. S., p. 294.)

The distinction referred to is founded, then, not upon a difference in the nature of the rights them-

selves, that is to say, as to whether they are natural or artificial, but upon the language of the prohibitions directed against the action of Congress.

This being established, let us examine this distinction with a view of ascertaining its soundness, and whether any line of demarcation can be drawn between the absolute withdrawals of power from Congress and "the form and manner in which a conceded power may be exercised." If such a distinction be sound it would be possible to relegate the Fifth, Sixth and Seventh Amendments to an inferior category.

Mr. Justice Brown speaks of the right to due process of law and to immunity from unreasonable searches and seizures, as well as from cruel and unusual punishments, coupling them with freedom of conscience, freedom of the press, etc., as "natural rights." Congress has the power to take property, to institute searches, to make seizures and to execute punishments. It is evident, therefore, that in no one of these instances does the prohibition go to the root of the power of Congress to perform the acts in question. It may authorize all these things, but when the government takes property it must do so by due process of law; when it institutes searches, they must be reasonable (that is to say, according to the canons of the common law), and when it prescribes punishments, they must be neither cruel

nor unusual, as those words are understood in the light of English and American common law and civilization.

It thus appears that in the seven illustrations given by the learned justice of rights with which Congress may in no event interfere, three are protected by the prohibitions which do not "go to the root of the power of Congress" at all. Nor is it possible to claim that the instances mentioned belong to the shadowy domain of natural or fundamental rights rather than to the more strictly defined and easily ascertainable category of common law rights. The Fifth Amendment contains a number of prohibitions directed against the action of Congress, all of which are admittedly based upon so-called common law categories rather than upon more general rights not so wholly identified with the development and history of the English law. If, therefore, for either of the reasons suggested there exists no distinction in the Constitution between the prohibitions in favor of natural rights and those in favor of artificial rights, consistency necessarily dictates that all of these be placed in the same class.

Not one of these rights was protected against the action of the government in Roman law countries at the time of the adoption of the Constitution, and they are clearly English common law rights in their genesis and development. They were totally op-

posed to the inquisitorial system of the civil law, and are exactly in the same category with the right to be tried only upon presentment by a grand jury and to be convicted only upon a unanimous verdict of a petit jury. No *refinement of philosophy can segregate the rights contained in these two amendments into different classes.*

If in the lapse of time some of the rights guaranteed by the Constitution are gradually deemed of less importance than formerly, it may be that the people should be called upon in the regular constitutional way to amend that instrument. The framers believed jury trial to be an essential element of liberty. Probably many of our people no longer take that view. Should the apparent change in public sentiment be sufficient reason to induce the court to make a decision which will be authority for the proposition that law courts, acting under United States sanction, may in our own domestic territory, without acting "contrary to the Constitution," ignore rights which English speaking men have considered vital since the barons humbled King John at Runnymede?

The language of Mr. Justice Brown as to natural rights quoted above was used as a foundation upon which to decide the *Mankichi Case* (190 U. S., 197) and that which was a mere dictum in the Downes

case has now become part of our constitutional law by reason of that decision.

In the Mankichi case, Congress, in annexing Hawaii, declared that:

"The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution *nor contrary to the Constitution of the United States,* nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine." (190 U. S., p. 209.)

Under the law as it stood at the time of the annexation of the Hawaiian Islands, criminal prosecutions were initiated by information, and trials were with a jury which could convict by a three-fourths vote. The defendant, Mankichi, was so tried and convicted of manslaughter. He sued out a writ of *habeas corpus,* which was sustained, and the Attorney-General of the islands took an appeal to the Supreme Court of the United States.

The case did not involve the question argued in the Insular Cases as to whether the Constitution was of itself applicable to the outlying possessions of the United States. The sole question was whether when Congress enacted that all laws not "contrary to the Constitution" should remain in force in Hawaii, the Fifth and Sixth Amendments

were not applicable there as elsewhere throughout the United States. These very amendments had been held applicable to criminal prosecutions in the other territories of the United States. (*American Pub. Co. v. Fisher,* 166 U. S., 464; *Thompson v. Utah,* 170 U. S., 343, and other cases.) It was urged that unless they were likewise applied in Hawaii this phrase of the Act of Congress was absolutely meaningless, and had the laws of Hawaii established religious tests for the holding of office, burning as a customary punishment, and general search warrants as a part of their procedure, such would not have been any more obnoxious to the constitutional objection than denial of the jury trial prescribed by the Fifth and Sixth Amendments

The government counsel, on the other hand, relying upon the dictum of Mr. Justice Brown, above adverted to, refused to assent to this conclusion, but claimed that there was a certain line of cleavage between the various prohibitions contained in the Bill of Rights in that some of the rights were fundamental or natural, while others only related to methods of procedure and hence could be dispensed with by the government.

The question was thus squarely presented to the court as to whether it had power to distinguish between equally positive prohibitions in the Constitu-

tion on the ground that some belonged to the domain of natural rights, while others did not. This would make the criterion of the rights of citizens or other persons in the United States dependent upon the court's view as to what constituted natural rights rather than upon the positive mandate of the Constitution.

In principle this view was irreconcilable with the decision in *Ex parte Bain* (121 U. S., 1).

The court answers the question, by saying that a literal interpretation of the statute would make applicable to existing Hawaiian law the prohibitions contained in the two amendments mentioned, but that no such literal interpretation should be given the statute, as it should be assumed that Congress did not mean to disturb the existing criminal legislation in the islands. Therefore, the trial as held, was decided not to have contravened the Constitution, but the court said, in answer to the argument of counsel, that their decision in favor of the government would necessarily be to render the words "contrary to the Constitution" mere empty verbiage:

"It is not intended here to decide that the words 'nor contrary to the Constitution of the United States' are meaningless. Clearly they would be operative upon any municipal legislation thereafter adopted, and upon any proceedings thereafter had, *when the application of the Constitution would not*

result in the destruction of existing provisions conducive to the peace and good order of the community. Therefore we should answer without hesitation in the negative the question put by counsel for the petitioner in their brief: 'Would municipal statutes of Hawaii, allowing a conviction of treason on circumstantial evidence, or on the testimony of one witness, depriving a person of liberty by the will of the legislature and without process, or confiscating private property for public use without compensation, remain in force after an annexation of the Territory to the United States, which was conditioned upon the extinction of all legislation contrary to the Constitution?' We would even go farther and say *that most,* if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation; *but we place our decision of this case upon the ground that the two rights alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property and their well-being."*

This, then, is the last step in the evolution of the decisions of our highest tribunal as to the constitutional right to jury trial and grand jury indictment. It serves to illustrate the fact that the court, in interpreting the Constitution, may, and does, positively amend or change it. Other

examples of this process might indeed be given, but we doubt if there are any which stand out so unequivocally as the one we have just been considering.

What has been said has not been intended in any way as criticism, or as the slightest reflection upon the judicial knowledge, acumen and intellectual integrity of that great tribunal. In deciding as they have done it is probable that they have acted wisely and for the best interests of the nation. It is, however, necessary that we should appreciate exactly what is taking place in the domain of constitutional law; by comprehending the nature of the process and its results we are in a position to criticize more intelligently, since even law courts are not beyond the domain of criticism, which can only be useful when just and intelligent.

As a people we have shown political ability and sagacity of a high order. Man is naturally a political animal, although he is many other things besides, and the English speaking political animal seems to have been the most practical since the days of Roman supremacy. While others have certainly surpassed him in different departments of human activity, such as art, literature and philosophy, they have rarely or never been able to combine in the same degree stability and progress in matters of government.

The fact that we have a written constitution is an accident of our history. But we have developed and changed it little less radically than the English have done their unwritten customary constitution. This result has been reached through the medium of judicial decision, save in the case of the three amendments following our civil war and designed to perpetuate its results.

But these judge-made changes have usually been in accord with and due to the spirit of the age; the court really doing little more than registering the modifications of the national common consciousness. Hence, these changes in most cases have passed unnoticed.

Where, however, the Supreme Court has endeavored to counteract, if not absolutely to stem a great current of public feeling, as it did in the Dred Scott case, the decision has only deepened and envenomed the conflict which it tried and hoped to avert. When President Buchanan announced that the expected decision of the court in that famous case would solve the slavery question forever, he did not appreciate the fact that the prestige and power of the court, as of all other branches of the government, must ultimately rest upon its harmony with the general settled trend of public opinion. The dominant sentiment in favor of the federal power to tax incomes resulted in a re-interpretation

by the American people of the constitutional clause in the recent XVIth Amendment.

The respect heretofore shown by our people for the Constitution, and the almost veneration with which they have regarded it, is in itself a sentiment that must be fostered and preserved, as the utility of the Constitution and its endurance must depend upon the existence of such a feeling. Destroy that conservative sentiment and the Constitution itself would be of little value.

The constitutions of South American republics are no guaranty of stability, not because of any defect in language or symmetry, but because the institutions they attempt to create do not command the reverence and respect of the nation. A constitution, like a suit of clothes, must be made with some reference to the wearer. If he live under the tropical sun his apparel, constitutional and otherwise, must not be over-elaborate.

The present tendency in America is to extend the activity of government over matters heretofore left to the individual. While the Supreme Court cannot, of course, remain oblivious of, or uninfluenced by, this tremendous drift of opinion, it should be careful not to hasten it or go in advance of it. Timely restraint may cause the reconsideration of various half-understood policies and keep

our government in the line of evolution rather than allow it to lapse into that of revolution.

Some of our old institutions may have become obsolete, but they cost many years of effort and much shedding of blood to establish, and they should not be surrendered without careful reflection. If the constitutional method of amendment is over-difficult the extra-constitutional method, useful though it has been and must still be, should not become too easy. It is said, and perhaps truly, that past generations should not control the actions of the present. But before we definitely conclude that our wisdom is so much greater than that of our forefathers, let us be quite sure that we are right. Above all, let not the Bar delude itself with fictions and official theories which only "blink the facts." Fearless analysis, not lazy acquiescence or unreasoning vituperation, were never more needed and seldom less practiced. The leaders of opinion cannot act intelligently unless they first think clearly.

V

CRIMINAL PROCEDURE AND THE CONSTITUTION

PUBLIC attention has recently been focused on some method of rendering our criminal law more effective. Has the constitutional provision that no man shall in any criminal case be compelled to be a witness against himself, rendered it over-difficult for society to protect itself against the criminal class? If so, new methods must be found and the Constitution changed or adapted to admit of them.

A hearty contempt for things foreign, in general, and legal institutions, in particular, is probably a healthful sign of national youth, of buoyant and exaggerated patriotism. Nations, like individuals, become more self-critical with age and less inclined to decry things merely on the ground that they are foreign. Whether the earlier is not the happier and stronger period I am not sure. We Americans, however, as we are so often reminded, are living in an epoch of rapid development. Increased facilities of communication, bringing us in closer contact with nations on the other side of the water, have

tended to teach us that we do not monopolize all the virtue and all the wisdom upon this planet and that the English common law is not the ultimate acme of human sapiency, however much the revered Blackstone may have delighted in that pious thought.

The annexation of twelve millions of people living under the civil law has brought under the American flag institutions which we had formerly scarcely known, save by caricature. Nevertheless, the youthful tendency is still strong in us, and occasionally the national enthusiasm seems aroused in unreasonable fashion. It was not long since our press was thundering away at the monstrous medievalism of the French legal procedure, as instanced by the trial of a woman charged with the murder of her mother and husband. Yet I am convinced that the procedure in that sensational case with its picturesque background of murderers clad in Levitical garments did not in any essential particular deviate from the methods usually prevailing in the French Court of Assizes. As these have been the methods daily practiced in those courts since the time of Napoleon, and in substance at least some two hundred years further back, the impression of novelty made upon the American people by the reports of the Steinheil case seemed somewhat surprising. Public interest may have been largely due to the fact that the prisoner at the bar was a woman whose qualities,

physical and mental, were far above the average, and whose past career had been a subject for salacious gossip in high political circles.

Despite all this, however, there was one objective upon which the popular attack seems to have centered as the characteristic of the French system most repugnant to American ideas. The fact that this interesting woman was forced to take the witness stand and for several days was interrogated in mercilessly hectoring fashion by the presiding judge is, of course, a thing unknown to our common law procedure.

The popular instinct in thus seizing upon the point, which appeared to it so anomalous, hit upon the really fundamental distinction between the two great systems of criminal procedure which divide the civilized world—one a lineal descendant of the Imperial Roman procedure, the other purely English in its origin and development. In the domain of criminal law the world-wide antithesis is between the Roman or inquisitorial system and the English or controversial system—the latter introduced in the federal and state constitutions among the great civil rights.

Our American lawyers, taught by traditional piety to believe that *habeas corpus* was the palladium of our liberties, and that Rome and Carthage lost theirs only because they had not invented that admirable

legal device, have been usually content to dismiss the inquisitorial system with a contemptuous shrug or a violent epithet. It must thus have been with some astonishment that many an American lawyer read the addresses of the Honorable William H. Taft suggesting that there is much in our criminal procedure that may well have outlived its usefulness, and that some of the elements of the Latin procedure which he had found and studied in the Philippine Islands were not without advantage, including the interrogation of defendants in criminal cases. I dare say that the most conservative stickler for the common law would not hesitate to question the office boy whom he suspected of pilfering his desk or pockets and would assume this to be the most natural method of ascertaining the truth. Yet when society wishes to protect itself against crime, this obvious method becomes unconstitutional and abhorrent.

In practice, nevertheless, the "Question" is supposed to be very generally used by the police of the larger cities for the purpose of detecting crime. Denunciation of the illegal character of what is popularly termed the "Third Degree" has been impotent to check it and this *extra*-legal inquisitorial method is believed to prevail quite generally. Nor would one who has seen the police or magistrates' courts in operation in the cities find it so difficult to think himself in the presence of a French *"Juge*

d'Instruction." The law of overruling necessity seems to be making more and more in the direction of our employing the most obvious method of seeking the guilty. Bentham, referring to the old English rules of evidence, said "they were admirably adapted to the exclusion of the truth." Many lawyers practicing in the criminal courts are now beginning to believe that the rule which prevents the state from compelling a person charged with crime to testify may well fall within the same category. Officially, however, we are still wedded to the old theory.

Recently in our Spanish possessions, Congress has, by statute, enacted the provisions of the Fifth Amendment, so that to-day a prisoner in those fortunate isles may no longer be compelled to be a witness against himself. I do not think sufficient data as yet available from which a judgment may be formed as to the expediency of this change in the criminal law, but it was one whose wisdom has been greatly doubted by President Taft. And we must, on the other hand, remember that for a long time in the United States, and recently in England, the strict rule against self-crimination has been generally relaxed by statute and a defendant who so wishes may now be allowed to testify in his own behalf. Doubtless this modification was intended to enable an innocent man,

anxious for an opportunity to clear himself of crime, to go upon the witness stand. I am inclined to believe, however, that the unforeseen, but inevitably logical, consequence must be to destroy the value (if any there be to-day) of the constitutional guarantee that no man shall be compelled to be a witness against himself. The statutes now provide, and judges must charge, that no presumption is to be derived from the failure of the prisoner to testify in his own behalf, yet juries will still be human, and even the legislature cannot always reverse the rules of human ratiocination. The recent Ohio constitution expressly provides that the prosecution may comment upon the defendant's abstention from the witness chair and thus by indirection deprives the privilege of value.

This departure from the common law marks, to my mind, a long step toward bridging the chasm between the inquisitorial system and our own.

The leading features of English-American criminal law are its litigious or controversial nature and the institution of jury trial, about which its whole procedure grew up. Jury trial, however, has ceased to be a sacrosanct institution; in several of our jurisdictions information by the public prosecutor, has taken the place of indictment by grand jury, and unanimity has made way for a majority verdict. As the continental nations have adopted the English

jury as a body for trying the facts in important criminal cases, the fundamental remaining distinction between the two systems is this: In the French system the initiative in and conduct of criminal cases belongs wholly to the courts (C. C. I., Art. 1); the procedure is not really in the nature of a lawsuit, but is rather an investigation conducted by the government officers for the purpose of detecting criminality. The English procedure, on the other hand, still smacks of its Germanic origin in retaining the character of an ordinary lawsuit, in which the plaintiff must prove his case against the defendant in practically the same manner as he must do in a civil case, with the additional burden that in the criminal case a plaintiff cannot put the defendant on the stand as he may now do in civil cases.

Popular prejudices usually have ancient origins. Surely, much of the popular dislike for compulsory examination of defendants is due to the association of the inquisitorial idea with that secret and awful tribunal which in the Middle Ages sought to secure religious uniformity by the liberal application of the "Question." While it is true that neither the medieval nor the Spanish Inquisition originated the procedure there employed, which was derived from the Roman law, it nevertheless applied it in much more arbitrary fashion, and to the exaggeration of its defects added torture as a leading feature. Con-

sidered apart from methods, however, there is nothing repugnant to enlightened justice in a mere oral public examination of the defendant in a criminal case.

The French system offers to-day the best antithesis to the system which our constitutional prohibitions have crystallized and an examination of its elements will furnish, perhaps, the best illustration of the modification, which might be made in our own were it not for a constitutional restriction whose wisdom is to-day very questionable.

I cannot attempt to give here anything more than the roughest outline of the French procedure. The French criminal law is codified in admirably lucid and logical fashion in two codes—the Code of Criminal Instruction (*Code d'Instruction Criminelle*), and the Code Pénal, the first treating of the procedure in the criminal courts, and the second defining crimes and prescribing corresponding punishments. While both of these codes were enacted under the master hand that re-created and re-framed French institutions during the first ten years of the last century, yet nearly all their leading features antedate Napoléon.

The origin of the French criminal law goes back to the Roman law. The criminal law of the later Roman Republic and early Empire was like our own, controversial or litigious; the private party

was plaintiff and the facts were submitted to a jury or commission, the Judex merely acting as a referee, and charging the law.

With the growth of Rome and the enormous influx of various peoples from all parts of the Mediterranean basin, there grew up a considerable criminal class, even more formidable, perhaps, than any we have yet developed in our own metropolitan slums. Probably owing to this, the methods of criminal procedure underwent a radical change. The City Prætor, charged with general police surveillance of the city, seems to have absorbed to himself during the first and second centuries all criminal jurisdiction, and the older methods were superseded by those in vogue in his courts. The procedure there was inquisitorial, the police authorities themselves initiating the proceedings and the judge deciding the whole case, both fact and law. This method, by which one judge sitting in secret, examined the defendant and witnesses at the instigation of the government was called "Inquisitio." It seems to have become more arbitrary as time went on. In the western portion of the Empire it was superseded by the customs of the Germanic tribes. The ordeal, compurgation, trial by battle, etc., took the place of a procedure, which, whatever its defects, was at least rational, that is to say, based upon an endeavor to ascertain

the facts by methods of inquiry founded upon human reason.

With the growth of the French monarchy, the action of the French royal courts was extended and at the same time this rational procedure gradually superseded the Germanic procedure whose continued existence was rapidly becoming incompatible with growing civilization. In developing a procedure for the royal courts, the Crown naturally looked to the ecclesiastical courts where the Roman procedure still continued in force. This procedure was codified in an important ordinance in 1539 by Francis I, and again in a more complete and elaborate codification in the great ordinance of Louis XIV's famous minister, Colbert (1690), which continued to be the basis of criminal procedure down to the time of the Revolution.

At the Revolution, laws were passed to wholly remodel French procedure, making it public, simplifying it and providing jury trial, as well as having citizens sit with the judges. The law was for a time in very uncertain condition until Napoléon undertook its comprehensive codification. He had little sympathy with the jury system so that his *Code d'Instruction Criminelle* (1809) was highly reactionary. It is true a jury was provided for, but it was merely superimposed upon the already existing structure and did not harmonize with it. Jury

panels were taken from a very small class, and the expectations of the men of the Revolution that the procedure of the old régime would be wholly changed were completely frustrated. The legal habits of centuries cannot be permanently changed by revolution and the *Code d'Instruction Criminelle* is still very largely founded upon the ordinance of 1690. This code has been subject to alteration from time to time, and was revised in 1834, although the changes were not very material.

The Code of Criminal Instruction contains 643 paragraphs. This code defines the organization of the courts, their jurisdiction and the procedure to be followed therein. The first book contains but one title and is concerned with the "judicial police" (*police judiciaire*) and the officers who exercise such police duties. The second book treats of the procedure in the criminal courts, and is composed of seven titles, respectively:

First—Tribunals of police.

Second—Matters which must be submitted to a jury.

Third—Methods of appeal.

Fourth—Procedure in certain special classes of cases.

Fifth—Removal of causes.

Sixth—Special courts.

Seventh—Certain matters of public interest and social safety.

The inquisitorial nature of the French procedure is indicated by the first article of the preliminary dispositions of the code which provides that the right to initiate proceedings resulting in the infliction of punishments, belongs solely to the government officers to whom it is intrusted by law (C. C. I., Art. 1). Where a crime is also a tort, the party injured may bring his action before the same tribunal as that which hears the criminal case (*partie civile*), and the two may be heard together. This is a proceeding which from the standpoint of economy and efficiency has much to recommend it.

There are three classes of infractions of criminal law. They are defined in the Penal Code (Art. 1, *et. seq.*) as contraventions, delicts and crimes. Contraventions are petty offenses justiciable in the smaller magistrate or police courts, subjecting the culprit to small fines or a few days' imprisonment. Delicts are punished in the court called *"Police Correctionel"* and are subject to fines and a term of imprisonment not exceeding five years.

The body called the *"Magistrature"* differs from anything we have in this country in that it includes not only all the judges but also the body of public prosecutors. The *procureurs* (district attorneys)

constitute a part of the *Magistrature* and are called *"The Magistrature Debout* (standing)." They have much wider powers than our district attorneys and exercise quasi-judicial functions. They are charged with the discovery and prosecution of crime, and they, with the *Maires, Gardes Champetres* (Rural Police), *Juges de Paix,* Officers of the *Gendarmerie, Commissaires Généraux* and *Juge d'Instruction* compose the police judiciary.

In each district there is a *Juge d'Instruction,* nominated for a period of three years by the President. Save in case of open breach of the peace, he does not himself initiate prosecutions but waits to receive complaints from the *procureur.*

The proceeding before the Judge of Instruction is probably the most characteristic portion of the French procedure. The prisoner is brought before the judge in his chamber and testifies, without the presence of the other witnesses. The hearings are secret, and until 1897 the prisoner was not entitled to counsel. By a law of that date, however, he now possesses the right to request to have such counsel as he may designate to represent him or in case of his failure to do so, counsel will be appointed by the court. Provision has also been made by the same law that he should be informed of the documentary evidence against him. The witnesses are sworn, interrogated and their answers reduced

to writing. They are examined separately. Persons must be examined within twenty-four hours after they have been arrested, otherwise they will be considered as illegally detained. The Judge of Instruction may, and in some cases must, grant bail, but the code seems to leave the matter very largely to his discretion where the penalty for the crime charged is more than two years' imprisonment. (C. C. I., 113.) In practice, bail is rarely asked for or granted, owing chiefly to the fact that arrest is made only after the judge has examined into the case sufficiently to warrant such arrest.

The judge examines fully the prisoner and all the witnesses, and if he deems it advisable, visits the spot where the alleged crime was committed. He is given full power to search houses, papers, and general effects of suspected persons (*perquisition*). This is one of the most drastic provisions of the French code and most at variance with our legal ideas. Immunity from search and seizure as a general right is quite unknown in France. The code provides (Sect. 87): "That the Judge of Instruction may betake himself wherever his presence is required, and may, even of his own initiative, go to the domicile of the arrested party, to there make a search (*perquisition*) of the papers, effects and generally of all those articles which may be thought useful for the disclosure of the truth."

Provision is also made that he may search in whatever other place he may believe evidenciary matter to be contained. If such papers or objects are without his arrondissement he may call upon the judge in whose arrondissement they are to make examination. One cannot help contrasting this very broad power with the rulings of our courts under the Fourth Amendment to the Constitution. The elaborate reasoning in *Adams v. New York* (192 U. S., 585) in which the Supreme Court held that incriminating articles, although unlawfully seized by the police, were not thereby made inadmissible as evidence, would probably cause a French lawyer to feel the same kind of bewildered interest which we do in studying the tribal customs of the Patagonians. The most natural thing that a French *procureur* and *Juge d'Instruction* would think of would be to search for evidence the place where the perpetration of crime was suspected.

Whether from the standpoint of social efficiency this system is not on the whole better than our own, I seriously question. In any event, I think that an examination of our decisions will show that we are restricting and limiting, rather than broadening, the prohibition against searches and seizures which grew out of political conditions wholly different from our own, and which, strictly interpreted,

render it much easier for the criminal class to carry on their avocation.[1]

If, after the conclusion of the examination the *Juge d'Instruction* is of the opinion either that the facts adduced do not make out any crime or that there is not sufficient evidence against the person charged, he then decrees that there is no ground for prosecution (*non lieu à poursuivre*) and the prisoner is released. If, on the other hand, he finds that the criminal law has been violated, he must then decide whether such violation constitutes a contravention or a delict. If the former, he will send the record (*dossier*) to one of the minor police courts; if the latter, to the *Tribunal Correctionel* for trial there.

Should he, however, find that the act is of so serious a character as to constitute a felony (that is to say, a crime for which *"peines afflictives ou infamantes"* are the punishment), he sends the *dossier* (record) to the *Procureur Général* at the Court of Appeal of the district in which the crime was committed.

This court is the regular body which hears all appeals in civil cases and also possesses criminal jurisdiction. One of the chambers or divisions of this court is called *"La Chambre des Mises en*

[1] *Twining v. New Jersey*, 211 U. S., 78, 103; *Wilson v. U. S.*, 221 U. S., 361.

Accusation." This subdivision of the Court of Appeal decides upon the *dossier* whether the prisoner shall be sent to the Court of Assizes. This chamber is really an indicting body. It may either concur with the *Procureur* and send the prisoner to be tried by jury, or it may decide that the case is one falling within the jurisdiction of one of the police tribunals. An appeal lies from the action of the Chamber.

If the Chamber holds that the crime is one to be tried at the Court of Assizes, the *Procureur Général* then prepares the document called "*Acte d'Accusation,*" corresponding somewhat to our own indictment. This "*Acte d'Accusation*" drawn up by the *Procureur* himself, contains a summary of all the evidence taken before the *Juge d'Instruction.* It is usually a somewhat long and denunciatory paper. The prisoner is then brought for trial before the Court of Assizes. The president of the Court of Assizes is selected from among the judges of the Court of Appeal and has, as assistant judges, two judges of the Court of First Instance, of the place where the Court of Assizes is sitting. In addition to the judges, there is a jury of twelve men drawn from a jury list. They are not held to the rule of unanimity, but decide by majority vote, the result being announced without dissent.

The trial is public. It opens by the appearance

of the accused and his being asked by the president his name, age, etc. An interesting episode then occurs. Section 311 of the Code provides that: "The president shall admonish counsel for the accused that he can say nothing contrary to his conscience or contrary to the respect due to the laws and that he must express himself with decorum and moderation." A provision of this kind inserted into our criminal codes might not be without good effect, nor without reason. The jury is then sworn, and the clerk reads the *Acte d'Accusation.* The *Procureur* opens the case and reads the list of witnesses who have been summoned, whether for the state, the accused, or for the civil plaintiff. The names of these witnesses must have been communicated by the party calling them, to the other parties interested at least twenty-four hours before the first examination. While this restrictive list might prevent all the witnesses who had not testified before the *Juge d' Instruction* from appearing at the trial, provision is made (Sect. 269) by which the court may at any time of its own motion summon any witness whose testimony it deems material.

The accused is now examined. This examination usually takes a very wide range as his whole life history which has been thoroughly developed before the *Juge d' Instruction* is gone over by the president. There are no rules of relevancy and only a few of

competency, such as that prohibiting persons closely related from testifying against each other. (C. C. I., 322.) Section 270 of the Code provides that the president may prohibit all matter which may tend to prolong the discussion (*débats*), without furnishing any greater hope of certainty in the results. In the Steinheil case, the president began his interrogatory of Mme. Steinheil, which lasted over several days, by asking her as to some alleged elopement which had occurred twenty years before the date of the crime. The whole of the first day's hearing was taken up with her history, and was a long wrangle in which the witness was allowed to answer what, and as much as she pleased, and in which dialectic honors did not always remain with the president.

Cross-examination as such is unknown, and the witnesses are questioned by the president, although the *Procureur Général* or members of the jury may, by obtaining permission of the president, ask questions. It is curiously enough specifically provided (Sect. 39), that witnesses may not be interrupted. Opportunity is thus given a witness to tell his whole story to the jury which has perhaps some advantages over our method of categoric question and answer. The accused or his counsel may question him by the voice of the president (*l'organe du President*), when his deposition is concluded, and may say any-

thing against him or against his testimony which he may think useful to the case. The examination of witnesses having ended, the case is then presented to the jury. The *Procureur Général* speaks first, and the accused and his counsel have the last word. This is a very great advantage for the accused, which has been pretty generally overlooked in the sweeping criticisms made of the French law.

The president is no longer allowed to sum up to the jury. He merely calls their attention to the functions which the law imposes upon them and he asks them to pass upon the question whether the accused is guilty of having committed such and such crime, together with the circumstances included within the *Acte d'Accusation*. Sometimes the questions are very numerous; I have known in a case at which I was present, the jury to be asked to pass upon twenty-four questions. General verdicts are unknown; all verdicts are special. The Court of Cassation has held that the president must put to the jury a distinct question as to every principal allegation of the accusation. (C. C. I., 337.)

The jury is also called upon to pass upon the question as to whether there exist attenuating circumstances (*circonstances atténuantes*). This right or privilege upon the part of the jury has been much criticized in France as in cases of heinous and cold-

blooded crimes, a verdict of *circonstances atténuantes* is often rendered. I attribute this, however, in great part to two circumstances. First, the growing dislike of the death penalty felt in France, and second, that as the verdict is by majority vote, it is often due to compromise. The "attenuation" is probably frequently found not in the crime, but in the evidence as to its commission. In this country, juries often seem to reach the same result by finding a lower degree of crime. There are so many circumstances attenuating guilt which the law cannot recognize or classify, I am inclined to think that the *circonstances atténuantes* method is not on the whole a bad one. The questions of the president are written out and given to the jury, together with the *Act of Accusation* and the evidence. The jury is then informed that they are to decide the case, not according to any mechanical rule as to number of witnesses, but by asking themselves the question whether they have a firm conviction as to the guilt or innocence of the prisoner. (*Avez-vous une Intime Conviction?*) (C. C. I., 342.) The verdict is then rendered by majority vote, but the number of votes cannot be declared under penalty of nullifying the judgment.

If the accused is found guilty and the court is convinced that although there are no errors of form, yet the jury have made a fundamental mis-

take, it has power to grant a new trial. It must be remembered that throughout the trial, the civil plaintiff is represented by his counsel and that the verdict also includes the question of whether the plaintiff has been damaged by the tort.

An elaborate system of appeal both to the Court of Appeal and the Court of Cassation exists. In addition, a revision or a new trial may be asked for, on the ground of newly discovered evidence, perjury of the witnesses or of another criminal judgment, inconsistent with the guilt of the defendant. (C. C. I., 443.)

The jurisdiction over crimes whose punishment exceeds five days imprisonment and fifteen francs penalty is confided to the Police Correctionel Courts which are also the tribunals of first instance, having general civil jurisdiction. These tribunals are composed of three judges. (C. C. I., 179-180.) Their sessions are public and the procedure is similar to that of the Court of Assizes, minus the features peculiar to the jury. From these courts, appeal lies to the Courts of Appeal. These latter courts have full jurisdiction virtually to retry the case and to enter any judgment they may think comformable to law and justice. They may, and often do, increase or diminish the penalty, or they may hold that the accused should have been held for the Assizes. This broad appellate jurisdiction is not

unknown under the American flag, for in the Philippine Islands we have the same system, and the Supreme Court in a very recent interesting case, held that a prisoner was not placed twice in jeopardy within the meaning of the constitutional guarantee, because of the fact that upon his own appeal his punishment had been greatly increased. (*Trono v. U. S.*, 199 U. S., 521.) Where there is no jury, as in the Correctionel Courts, this seems to be a wise and humane system. No reason exists in the absence of jury trial for not according such a broad power to the court on appeal.

A pretty general discussion of foreign criminal procedure would seem not inopportune in America at the present time. It is clear that certain features of the French procedure are entirely inimical to our ideas, but I am inclined to think that in final analysis, our objection is rather to the methods than to the fundamental principles. The essential feature of the inquisitorial system, namely, the examination of the party charged with crime, is certainly based upon a sound, common-sense view. Whenever or wherever any kind of investigation is held, and real knowledge of all the facts is desired, the parties most cognizant of the transactions are examined.

The rule as to incompetency of parties in civil cases has long since been abolished. I find it difficult to see why the old rule should be retained

in criminal cases. It grew up in a time when examination of the parties meant interrogation accompanied by the application of various ingenious devices for the purposes of extorting confession by producing the maximum of physical pain. That a morally developing society should finally revolt against this hideous barbarism by abolishing "the question," was quite natural.

As Stephen, the historian of the English criminal law, has said: "In the seventeenth century the accepted maxim which was sometimes called the Law of God, and sometimes the Common Law of England, was *'nemo tenetur accusare se ipsum.'* A phrase not the less influential because it rested on no definite authority." Of course, the self-accusation there mentioned was that which was produced by torture, a thing unknown to the Roman law in its better days, and in no wise necessarily connected with the examination of the prisoner. The medieval theory seems to have been that the only complete proof of the commission of crime was the confession of the culprit and that such confession, however superinduced, was the necessary basis for conviction. It was only in the eighteenth century in England that the practice of questioning a defendant on his trial was entirely done away with.

As the rule stands in common law countries to-

day, it appears to me to give the guilty an unfair advantage. That the privilege of testifying may be, and usually is of assistance to the innocent is evident from the fact that the prohibition against the witness appearing in his own behalf has been removed.

I do not mean, however, to wholly approve the French methods. It is one thing to have a party after he has been fully apprised of the nature of the crimes charged, and the evidence against him, put upon the witness stand and examined by the prosecutor, with an opportunity for a re-examination by his counsel, and quite another to have him brought before a magistrate, questioned at the discretion of that magistrate and then again questioned at his trial by the president of the tribunal. This latter proceeding certainly lacks the dignity which makes of the judge an impartial arbiter, and must often work great injustice in the case of a sensitive or timid defendant. Much criticism has been excited in France of recent years by the practice which permits the president to conduct the examinations during the trial. Some French lawyers believe this to be contrary to the law, but the provision of the code (319) would seem to indicate that all questions must be addressed by the voice of the president (*par l'organe du President*). The Ministry of Justice asked for and obtained an amendment of the criminal code by which the president will be

relieved of this duty, and questions will be asked by both prosecution and defense. This may well lead in time to the development of cross-examination, a thing hitherto unknown to the French law, and which is certainly, within reasonable limits, a very valuable device for the sifting of testimony.

Whether the French system as a whole is more efficient in the repression of crime than our own, I do not know, and I doubt whether the question can be answered positively. It is an outgrowth of French society and conforms to French needs and views. With slight modification such as is now recommended, I see nothing in it incompatible with a fair and efficient administration of the criminal law.

It has long been a maxim of the English criminal law that it were better that ninety-nine guilty men should escape than that one innocent man should suffer. Whether this is sound from the social standpoint may be greatly doubted, but certain it is that a criminal law so framed and administered as to allow the escape of ninety-nine per cent or any considerable percentage of criminals, would be an inefficient safeguard for modern society. That the delays and technicalities of the criminal law have become in America a shocking abuse is manifest and admitted. The appalling prominence of "Judge Lynch" cannot be dismissed with a mere

phrase as to American lawlessness, but the paralysis of legal procedure due to over-emphasis of individual rights, as opposed to the collective good, must be held largely responsible. It is also unfortunate that the prestige of the constitutional system should longer be impaired by the retention of this right against self-crimination. It should be abolished or very much modified. It has no longer any *raison d'être*.

Undoubtedly the jury system, the public nature of all trials and examinations of prisoners, and the litigious as distinguished from the inquisitorial method of procedure are valuable acquisitions which American law should not lightly surrender. It verges, however, upon the absurd to turn respect for old rules or maxims into mere fetish worship. The rule against compelling examination of parties in criminal cases may well be thought to have outlived its usefulness. It is of no value to the innocent, and highly detrimental to society in its war against crime. Must we continue to maintain it because some hundreds of years ago its violation was accompanied with incidents which have disappeared as completely as have trial by battle, or the ordeal of walking upon red hot iron as a satisfactory test for the ascertainment of criminality?

If the French legislator has been wise and liberal enough to borrow our jury system, may we not in

turn gain something by examining in sympathetic spirit a system which has been worked out by the best legal minds of Continental Europe?

Increase in crimes of violence, epidemics of commercial fraud and general disregard for law are appallingly prevalent in nearly all parts of our Union. That our criminal law, both in its substance and in its administration, is in an unsatisfactory condition is manifest. In striving toward its needed reform, we cannot wisely ignore the advantages, nor overlook the faults of other legal systems prevailing among peoples of a civilization as highly developed as our own.

VI

THE CONSTITUTION AND OUR NEW PEOPLES; CITIZENS, SUBJECTS, NATIONALS OR ALIENS

AMONG the still unsolved problems incident to our annexation of the Spanish possessions, none is more complex, nor presents more difficulties, both practical and theoretical, than that of the status of the Islanders, both Porto Ricans and Filipinos.[1] This is mainly owing to the fact that for the first time in our history we have acquired real dependencies. By that term I understand territories inhabited by a settled population differing from us in race and civilization to such an extent that assimilation seems impossible, and varying among themselves in race, development and culture to so great a degree as to make the application of any uniform political system difficult if not impracticable.

It is idle to attempt to find any adequate or guiding precedents in our former territorial acquisitions. The territories transferred from France and Mexico were not sufficiently populated to bring us

[1] President's Message, 1913.

face to face with the real imperial problem, i. e., the domination over men of one order or kind of civilization by men of a different and higher civilization.

The Nomad tribes of America presented indeed a problem, but only a passing one. North America could not for mere sentimental reasons remain as a game preserve forever, in order that a few hundred thousand red-skinned hunters might indulge their taste for the chase and gain subsistence thereby as they had done in the past. Necessity and the ruthless progress of civilization compelled the opening up and exploiting of the American continent by the overflowing population of Old Europe. The Indian problem was met by taking the land, whether as the result of a bargain or through force as the white man needed it, and the relations of the newcomer with his Nimrod predecessor were gradually reduced to a minor question through the agencies of fire water, gunpowder and well-intended but unwise policy. The logic of events is more powerful than that of Aristotle.

The populations taken over from France and Mexico were insignificant in number. They were, moreover, largely of Caucasian race and civilization, and a growing stream of immigration soon made the new lands thoroughly American, and thus the question there quickly became academic. Moreover, the two civilizations were in fact equal or

nearly so, and the treaties, both of Paris (1800) and of Guadalupe Hidalgo (1848), recognized that fact by according to the new inhabitants the rights of American citizens. Thus the problem as to the legal status of the inhabitants of Louisiana and the territory acquired from Mexico was solved or solved itself *ab initio*. The underlying theory upon which both treaties were based was expansion rather than imperialism.

But the problem of to-day cannot be solved either by extermination, as in the case of the Indian, nor by assimilation, as in the case of the few Frenchmen and Spaniards. Neither the methods of Miles Standish nor those of Jefferson will suffice us now. We must move on a heretofore untrodden path and seek for precedent upon which to base intelligent legislation and administration, not in our own history, but in that of other nations who have preceded us in attempting to govern non-assimilable peoples.

In such a discussion as this we must begin by defining the necessary terms, otherwise we will end as do most academic discussions in having with much clamor demolished a man of straw. The object is to ascertain exactly what, under existing law, is the constitutional and legal status of the Porto Rican or the Filipino. To call him a citizen when we are in hopeless disagreement as to the meaning of that term will only result in creating added con-

fusion and in arousing excitement in many excellent but possibly not very analytical minds.

Citizenship, broadly speaking, means simply membership in some political community.[1] In the ancient world it was dependent upon descent (citizenship *jure sanguinis*). The descendant of a citizen was always a citizen wherever born, and the descendant of a foreigner always a foreigner unless actually naturalized by positive legislation. At Rome the rule was "once a peregrine always a peregrine." The *Jus Sanguinis* thus inherited from the Roman law became the law in Europe, but for obvious historic reasons never took root in England. In that country the rule of *Jus Soli,* or citizenship because of birth within the king's allegiance and dominion, was the law from the time of the Norman conquest. As Professor Pollock says:

"A foreigner at the head of an army recruited from many lands conquered England, became King of the English and endowed his followers with English lands. For a long time after this there could be little law against aliens, there could hardly be such a thing as English nationality."

Thus it came about that by the English law:

"As regards the definition of the two great classes of men which have to be distinguished from each

[1] Cyclopædia of Political Science Article, "Nationality," by Munroe Smith.

other, the main rule is very simple. The place of birth is all important. A child born within any territory that is subject to the King of England is a natural-born subject of the King of England."

Coupled with this rule, which has continued in England to be the law down to the present, was the doctrine of indelible allegiance and consequent denial of the right of expatriation. Hence the rule "once a subject always a subject"—but this doctrine was modified at common law and by statute so that the right to change one's allegiance was recognized by allowing British subjects to expatriate themselves and aliens to become subjects by letters patent from the Crown or by Act of Parliament, i. e., by denization or naturalization.

Thus the sole requisite necessary to constitute a British subject is allegiance or subjection. This subjection, whether due to birth within the King's dominion or to a transfer of allegiance from a foreign sovereignty to English sovereignty, is the one essential requisite for determining the political status of the individual. Either he owes allegiance to the sovereign or he does not. In the one case he is a subject, in the other he is an alien. It is quite evident that these two categories include all men and leave no middle class.

Whatever number of classifications may exist as to subjects and what rights, civil or political, belong

to each class or how diverse may be the privileges accorded by law or treaty to aliens of one nation or another, the English law leaves no room for quibble as to who are aliens and who are subjects.

In the United States the law has not been so clear.

First, because by reason of the federal form of government there is a double citizenship, i. e., that of the State and that of the United States, and

Second, because of the disuse in this country of the word "subject" and the general adoption of the term "citizen."

Since the time of the separation of the colonies from Great Britain, all through what has been accurately termed "the Confederation Period" of our history, there was doubt as to whether United States citizenship was merely derived from and dependent upon State citizenship or whether it might exist independently of membership in one of the States. It is needless to examine that question here, the civil war solved it and the Fourteenth Amendment crystallized the solution into constitutional dogma.

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state in which they reside."

This definition is substantially that of the common law. The phrase "subject to the jurisdiction" is the

equivalent of the common law phrase "born under the actual obedience." The amendment thus made citizenship and subjection identical, and hence the doctrine enunciated in the Dred Scott case that in the United States there were persons who, although subjects, were yet not citizens, was done away with.

Chief Justice Taney in that *cause célèbre* had held that the free negroes were not citizens, although they were, of course, not aliens. They were in the theory of the opinion subjects but not citizens. Thus, for the first time in our history we had a judicial declaration that there might be subjects who were not citizens. The Fourteenth Amendment settled and was intended to settle the question as to the negro. How does it affect the Porto Rican and the Filipino?

Before determining this we must remember that the word "citizenship" is used in two senses:

1. It denotes the holders of political rights, i. e., those upon whom the law has conferred the suffrage. Possession of this right usually depends upon various qualifications of sex, education, length of residence, etc. Such citizens are a subdivision or portion of the inhabitants "within the actual obedience of the United States" or subject to the jurisdiction thereof. They may be properly denominated Burghers or Burgesses. They are active citizens.

2. And it is also used as signifying all others born or naturalized in the United States. This includes women, minors, incompetents, etc. Regardless of any political status they are citizens of the United States and entitled to all the "rights, privileges and immunities" guaranteed to such citizens. They are citizens because of their owing allegiance to the United States and hence as to them citizenship and subjection are identical. This class may be termed passive citizens.

If we used the term subject, all citizens active and passive would be included in that term. That term has now fallen into general disfavor outside of Great Britain because of its usual reference to a monarchical form of government.

A very convenient term not open to any objection on this score is the term "national." National would include all persons owing allegiance to the United States and exclude all persons owing allegiance to any other power. It is the co-relative of alien, and the two together are universally inclusive. A national is one who owes allegiance to any State, whatever its form of government. All citizens must be nationals, but all nationals may not be citizens. Dred Scott was not an alien; he was a national, but he was not, under the famous decision, a citizen. The Fourteenth Amendment settled the question for the African race and made citizen and subject

synonymous terms, but the inquiry arises, have new conditions and new legislation given us another class of Dred Scotts, i. e., nationals (or subjects) but not citizens?

Applying the foregoing reasoning to the case of the Porto Rican or Filipino, the first inquiry is not whether he is an alien or a citizen, because these terms may not be necessarily exclusive. But is he an alien or a national?

If he is an alien, the inquiry need go no further; the legal position of an alien is clear enough. If, on the other hand, he is a national, as would appear from the decision of the Supreme Court in the case hereafter referred to, the problem is only partly solved. He is not under the disabilities of alienage, and the laws applying to aliens do not affect him. But do the positive rights of citizenship granted by the Constitution and United States laws apply to him? That, I think, is the only really difficult question. Have we to-day a class of nationals who are not citizens, who though not aliens and entitled to the protection of the United States, cannot, for instance, institute suit in a federal court? This question still remains unsettled fourteen years after the Treaty of Paris, because of the continued inaction of Congress.

The Treaty with Spain of April 11, 1898, provides that:

"Article II.

"Spain cedes to the United States the Island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the Island of Guam in the Marianas or Ladrones."

"Article III.

"Spain cedes to the United States the archipelago known as the Philippine Islands, and comprehending the islands lying within the following line: * * *"

"Article IX.

"Spanish subjects, natives of the Peninsula, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom, retaining in either of them all their rights of property, including the right to sell or dispose of such property or of its proceeds; and they shall also have the right to carry on their industry, commerce and professions, being subject in respect thereof to such laws as are applicable to other foreigners. In case they remain in the territory they may preserve their allegiance to the Crown of Spain by making, before a Court of Record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have renounced it and to have adopted *the nationality* of the territory in which they may reside.

"*The civil rights and political status of the native*

inhabitants of the territories hereby ceded to the United States shall be determined by the Congress."

The Treaty thus definitely accomplishes one legal result; it transfers the sovereignty of Spain over the islands and their peoples to the United States and with such sovereignty necessarily the allegiance of the people. The Porto Ricans thereby ceased to owe allegiance to Spain and now owe it to the United States. Whatever consequences follow from this fact cannot be avoided. But their allegiance or subjection having been transferred, they necessarily have become United States nationals or subjects. No other conditions are necessary to constitute American nationality. Even the free negro before the Fourteenth Amendment was a national, he was not an alien. The islanders cannot be aliens unless they owe allegiance to some other government, and even the most advanced anti-Imperialist will not contend that they are still subject to Spain, however much he may deprecate the making of the Treaty of Paris.

The man without a country is not known to law. Having ceased to be Spanish subjects or nationals, they are no longer aliens and have necessarily become United States nationals.

This would seem to be as demonstrably obvious and certain as anything can be in the domain of law, public or private, and has the sanction of the

Supreme Court. A native inhabitant of Porto Rico was detained at the port of New York in 1902 and ordered sent back to Porto Rico as an indigent alien under the statute giving this power to the commissioner, under certain circumstances, in the case of alien immigrants.

This immigrant, Isabella Gonzales, sued out a writ of *habeas corpus* and was brought before the United States Circuit Court in the Second District. It is not apparent why the court did not sustain the writ upon the ground that the petitioner, even if an alien, was not an immigrant, the immigration laws not being intended to apply to persons traversing domestic territory of the United States. However, the opinion makes no mention of this point. The court dismissed the writ and remanded the petitioner to be returned to Porto Rico, upon the ground that as a native Porto Rican she was an alien and amenable to the immigration law.[1]

The reasoning by which the result is reached is contained in the four following propositions:

I. The inhabitants of Porto Rico were aliens prior to the ratification of the Treaty of Paris, April 11, 1899.

II. As such alien inhabitants they could only become citizens of the United States by naturalization.

[1] 118 Federal Reporter, 941.

III. The petitioner having been born before the treaty, must show that she has been naturalized. She could invoke no law save the treaty of annexation. But conceding the possibility of collective naturalization by treaty, the Treaty of Paris expressly reserved the "civil rights and political status of the native inhabitants" to the future action of Congress.

IV. Congress not having legislated as to the naturalization of Porto Ricans, they have not become citizens; *therefore, their original status remains unaffected and they are aliens.* Or to use the learned judge's exact language:

"Being foreign born and not naturalized, she remained an alien and subject to the provisions of law regulating the admission of aliens who come to the United States."

Thus, according to this decision, there was no middle ground between citizens and aliens, and any one who is not an American citizen is necessarily an alien.

"An American alien" certainly would seem, at least to one unaccustomed to the startling paradoxes of the law, a strange and monstrous category. Is it a logical result? I think not, and for the following reasons:

I. The treaty actually accomplished a cession of the territory and a transfer of allegiance. It made the territory domestic territory; the reservation as to political status and civil right cannot change that cardinal fact.[1]

II. Aliens are merely foreigners residing or sojourning in the United States. An alien is necessarily a foreigner and must owe allegiance to another country.

"An alien is a foreigner, a person resident in one country but owing allegiance to another." Ency. Law, Alien.

When the Porto Rican ceased to owe allegiance to Spain, it is difficult to see how he could still remain a foreigner. He was an inhabitant of domestic territory. Certainly he occupied a different relation to the United States from that which he had previously sustained. He became subject to its laws and its exclusive sovereignty. These facts must have some significance. He was in fact a United States national by virtue of the mere cession of the island to a new sovereignty and the transfer of his allegiance.

The treaty could not take away his Spanish allegiance, transfer it to the United States and leave him unaffected. The status of alienage or non-

[1] *De Lima v. Bidwell* (1901), 182 U. S., 1.

alienage depends upon facts. The facts accomplished by the treaty were none the less facts because the power was reserved to Congress to pass upon the status of the Islanders. Congress cannot make red men white men, even by joint resolution, nor can they make Porto Ricans aliens by calling them such. In order to become aliens they would have to pass under another domination. They might be transferred to Spain or ceded to some other power or given independence, but until then they *are and must remain United States nationals.* It would seem that the result there reached was predicated upon the assumption that citizenship and alienage are exclusive categories, and not to fall within the one necessarily implies belonging to the other.

This case was appealed to the Supreme Court of the United States (*Gonzales v. Williams,* 192 U. S., p. 1). The court did not deem it necessary to pass squarely upon the question as to whether or not Porto Ricans were citizens of the United States, but they decided that the Immigration Act did not apply to Isabella Gonzales for the reason that she was not an alien immigrant, and that consequently the Commissioner of Immigration had no jurisdiction over or no power to detain her.

The Supreme Court, speaking through Mr. Chief Justice Fuller, said:

"Counsel for the government contends that the test of Gonzales' rights was citizenship of the United States and not alienage. We do not think so, and, on the contrary, are of opinion that if Gonzales were not an alien within the act of 1891, the order below was erroneous.

"Conceding to counsel that the general terms 'alien', 'citizen', 'subject', are not absolutely inclusive, or completely comprehensive, and that, therefore, neither of the numerous definitions of the term 'alien' is necessarily controlling, we, nevertheless, cannot concede, in view of the language of the treaty and of the act of April 12, 1900, that the word 'alien', as used in the act of 1891, embraces the citizens of Porto Rico." * * *

"We think it clear that the act relates to foreigners as respects this country, to persons owing allegiance to a foreign government, and citizens or subjects thereof; and that citizens of Porto Rico, whose permanent allegiance is due to the United States; who live in the peace of the dominion of the United States; the organic law of whose domicile was enacted by the United States, and is enforced through officials sworn to support the Constitution of the United States, are not 'aliens', and upon their arrival by water at the ports of our mainland are not 'alien immigrants' within the intent and meaning of the act of 1891."

The decision of the Supreme Court thus upheld the thesis herein propounded. The inhabitants of our new territory were Americans, nationals, liege-

men or subjects as one may prefer to call them; they are certainly not foreigners, though they are not necessarily citizens.

As we have seen, the fact of alienage necessarily involves the idea of a power to whom allegiance is due. But no man or woman can owe the debt of allegiance without an equivalent. Who feels the advantage should also bear the burden, says the old adage; but it is equally true that he who is called to bear the burden should derive some benefit or compensation therefrom. What "commodum" or advantage did the Señorita Gonzales reap from her situation? To whom does she owe allegiance, outside of the United States? What nation in the wide world will raise, nay, will be permitted by us to raise a finger or even a voice in behalf of this woman if she is injured in her property and restrained in her liberty? What flag may she look to in her necessity, outside the flag of the United States? Against what government or nation may she commit treason? And if she should commit such acts, in Porto Rico, against the sovereignty of the United States as constitute that crime, would she go unwhipped of justice because she had not been naturalized a citizen of the United States?

If it should be claimed that a treaty alone and without an act of Congress cannot raise her out of her condition as a derelict alien, it is plain that such

a claim cannot be sustained. The treaty became from the date of its ratification the supreme law of the land, and the language here is plain and unequivocal: "Spain *cedes to the United States* the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies." This cession, accepted as it was by the United States, necessarily transferred the sovereignty to this government. That sovereignty plainly is, as it must be, exclusive of any foreign power. Either Miss Gonzales is an undefined waif on the sea of political uncertainty, or she *belongs* to the United States, and may look to it for protection against injury, for redress where wrong has been done and for assistance where it may be needed against any government of the earth, Spain included. The new master, viz., the United States, takes her allegiance with a burden, and having deprived her of all claim on the old master, has taken his place.

Other clauses of the treaty make these considerations more plausible than they might be if unaided by the terms of that instrument. To some extent, at least, the contracting parties had in contemplation the possible rights of the Spanish citizens who were transferred to a new sovereignty. There is a saving clause allowing an option to *Spanish subjects, natives of the Peninsula,* residing in the territory over which Spain by the treaty relinquished or ceded

her sovereignty. Such residents might *preserve* their allegiance to the Crown of Spain by making, before a court of record, a declaration of their intention to preserve such allegiance; otherwise they would be held to have renounced it and to have adopted "the *nationality* of the territory" in which they might reside.

Assuming then the Islanders to be nationals, as we certainly must, since the decision of the Supreme Court above referred to, still the question remains: Are they citizens?

In endeavoring to arrive at a rational solution of this question, it is necessary to remember that the inhabitants of the Island are of two classes: First, those born prior to the taking effect of the Treaty of Cession, that is to say, April 11, 1899, whom we may properly call the *ante nati,* and, second, those born subsequent to the ratification of the Treaty, whom we may designate as the *post nati.* The possible distinction between these two classes is due to the wording of the Fourteenth Amendment, that "all persons born or naturalized within the United States are citizens thereof." Assuming the words United States in the Amendment to comprise the possessions wrested from Spain and ceded by the Treaty, the *post nati* would thus be full citizens of the United States.

In view, however, of the decision of the Su-

preme Court in *Downes v. Bidwell,*[1] that the words "throughout the United States," in the revenue clause of the Constitution did not comprise the new possessions, it is quite possible that a relevant and proper case being presented to that tribunal the decision (following the reasoning of *Downes v. Bidwell*) would be to the effect that the language of the Fourteenth Amendment contemplated only those portions of the United States covered by State governments or technically "incorporated" into the United States. It is to be hoped that such a case will in the near future be presented to the court.

As a discussion of the possible distinction between *ante nati* and *post nati* would involve a discussion and analysis of the Downes case, we will not take it up here. The question will now be considered simply from the standpoint of the inhabitants in existence at the time of the annexation, and we will leave the question as to whether their descendants would, in virtue of the Fourteenth Amendment, have any greater rights, than themselves, to the future determination of the Supreme Court of the United States.

It must be admitted that the Treaty has done whatever it could by its language to prevent the inference that there was any collective naturalization of the people of the Islands. While a treaty

[1] (1901) 182 U. S., 244.

may indeed collectively naturalize a whole people,[1] nevertheless it is fair to assume that the Treaty must intend such naturalization to take place. In this case, "the political status and civil rights" having been reserved for the future action of Congress, it is fair to argue that no naturalization has taken place; it has, however, already been shown that the Porto Ricans were nationalized, that is to say, their allegiance transferred, but as nationalization does not necessarily mean naturalization, and as naturalization has not been brought about, either by the Treaty or by subsequent act of Congress, it seems that they occupy an intermediate status between citizens of the United States and aliens. In other words, they are entitled to the protection of the government, and as far as foreign nations are concerned are Americans, yet they may not be vested with all the rights of citizens of the United States.

What these rights of citizens of the United States are, it is very difficult to determine. The trend of doctrine in the Supreme Court of the United States seems to be that most of the rights of citizenship are under the protection of the States themselves, that civil liberty was not nationalized by the Fourteenth Amendment, and that only such rights, as are expressly secured by the Constitution

[1] *Boyd v. Thayer* (1892), 143 U. S., 135.

of the United States, belong to the citizen; that for the vindication of all others he must look to the State. Thus the citizen of the United States who is not also a State citizen, but an inhabitant of a territory, holds his rights subject to the discretion of Congress, except in as far as that body may be limited by the mandates of the Constitution.

Notwithstanding the statement of the Supreme Court that the enumeration "would be more tedious than difficult,"[1] we have already seen that the rights of citizens of the United States are almost impossible of definition. The general right to life, liberty and property, provided for by the Constitution and more specifically by the ten amendments in favor of civil liberty, apply to all men alike, whether citizens or aliens.

The only positive right conferred by the Constitution upon a citizen as such seems to be the right to sue in a federal court. This was the right which it was held that Dred Scott did not possess because not a citizen. Thus, as far as the government of the United States is concerned, the inhabitants of the Islands, assuming them to be nationals, but not citizens, could hardly be said to have any lesser civil rights in fact than full citizens of the United States. While they could not sue in federal courts, this would scarcely be an additional burden to those

[1] 176 U. S., 589.

that remained at home, because this right only belongs to a citizen of the United States residing in a State. It is not possessed by the residents of the District of Columbia, nor of the Territories of the United States.

As far as the action of the States themselves is concerned, the matter becomes somewhat more complicated. One of the most natural illustrations is as to the holding of real estate in the various States. In many of our States there exists as an obsolete remnant of the old and barbarous *Droit-d'aubaine,* the law by which an alien holder of real estate is subject to an action of forfeiture. This rule, according to the learned Mr. Pollock, arose historically from the habit of the English Crown of confiscating the estates of Norman nobles, situated in England, who swore allegiance to the Crown of France after the separation of Normandy from England. This practice ripened with time into a general rule of law. Its illustrious origin has long been forgotten, and it now remains as a remnant of ancient, time-honored law.

It is to be noted, however, that the right to hold real estate free from any interference on the part of the government, is not a right inherent in the citizen as such, but that the prohibition is simply a disability of alienage. Thus, if our theory be correct, a Porto Rican might well hold real estate in

the City of New York, free from molestation by the Attorney General, because, although not a full citizen, he certainly is not an alien, and, therefore, not under the consequent disabilities.

It is thus apparent that there are very few, if any, civil rights which he does not have in common with citizens.

As to political rights, however, the situation is entirely different. Usually, though not always, the right to vote in the various States is conditioned upon citizenship of the United States, and a Porto Rican national, in the absence of State legislation, especially made to fit his case, would not be allowed to vote in the States. As some of the States, however, allow aliens to vote, after a declaration of intention to become citizens, this disability could and would easily, if the State desired it, be removed for the benefit of those of our new inhabitants who desired to settle in the States.

It is manifest that the distinction here made between aliens and nationals is very important for the Islanders themselves, and by reason of it they are not under the disability of alienage and enjoy nearly, if not quite, all the ordinary civil rights pertaining to the citizen.

On the other hand, the distinction between the two classes of nationals, namely, full citizens of the United States, that is to say, those born or natur-

alized within the United States, and those not born or naturalized therein, but owing allegiance thereto, becomes also important. If these latter are not citizens of the United States, all the political privileges accorded by law to persons as such citizens would not apply to them, and thus in the absence of special legislation they would have no political rights in the various States until the States chose to change their legalization. In so far as the Islanders remaining at home are concerned, they would, of course, even in the absence of any treaty clause, be subject to the complete control of Congress in the matter of political rights, the Constitution placing no limitation upon Congress acting in and for the Territories in that regard. In this respect they would be under no greater political disability than inhabitants of the District of Columbia.

It may be asked whether they have the right to trial by jury and to the other civil rights guaranteed by the Constitution. It is sufficient to say that these rights are in no wise dependent, either upon citizenship or alienage. These are accorded to all persons.[1]

It is quite possible, however, that the Supreme Court might decide that some of these limitations were only operative upon Congress when acting within the United States proper, and that, there-

[1] *Yick Wo v. Hopkins* (1885), 118 U. S., 370.

fore, they did not apply to the new inhabitants. It is thus seen that this question is entirely beside that of citizenship or alienage and has only to do with the applicability of certain portions of the Constitution when limiting the power of Congress legislating for the new territory.[1]

In our own history we have but one precedent, and that, one which Americans can scarcely regard with pride, namely, the condition or status of the free negro before the Fourteenth Amendment, as determined by the Dred Scott case. The condition of the tribal Indian who had left his tribe furnishes some analogy.[2] Other nations, however, have for years past had the same problem before them as we have now, and have solved it in much the same way.

One of the most interesting of recent territorial acquisitions, by reason of the mixed character of the population, is that of Algeria by France. The French Chambers not having legislated as to the status of the inhabitants of Algeria, the question as to the status of the natives of Algeria came before the Court of Appeal of Paris in 1839. The question was very similar to that involved in the Gonzales case, as in neither case had the execu-

[1] (1901) *Downes v. Bidwell,* 182 U. S., 244.
[2] *Elk v. Wilkins,* 112 U. S., 94.

tive or the legislative authorities conferred any rights of citizenship upon the annexed people, but had simply transferred their allegiance from their former sovereign to the new one. The court there decided that although there was no legislation fixing their status, and it had not been established by any treaty, nevertheless the Ordinance of the 10th of August, 1834, had submitted the Algerians to French law and sovereignty, and from that time it was no longer possible to assimilate them to strangers. On the 14th of July, 1865, only, were they actually declared French by a *senatus consultum,* but although decided to be French they were held to be still governed by the Mussulman law, to which they had been subject at the time of their annexation. The French Government thus recognized a situation which we, until very recent years, refused to recognize in the case of the Indians, namely, that such tribes or peoples living under a different law and civilization, possessing a complete organization of their own, should be treated as nationals of the sovereignty to which they were really subject, but should in their private relations be governed by their tribal law. While we did not interfere with the tribal law of the Indians, we yet affected to assimilate them rather to a foreign people than to nationals, and made treaties with them in preference to legislating for them directly. Our

legal theory was thus at variance with the actual facts.

To return to the Algerians. By administrative decrees of the 10th of September, 1886, and of the 17th of April, 1889, the Mussulman law ceased to be the common law for the inhabitants of Algeria, and thereafter the French law was to apply to them. Certain exceptions, however, were notedly retained in what concerns the status of persons, successions, and real estate held in community.

The Algerian subject is accorded no political rights whatever and can acquire none except by becoming a French citizen. This the Algerian may become by direct legislation, as, for example, the Décret Crémieux, October, 1870, which conferred French citizenship on the Israelite inhabitants of Algeria, or by naturalization, but this naturalization is somewhat different from the naturalization of an alien. The Algerian has only to make a simple declaration before the Mayor, and after the inquiry by the Mayor and the recommendation of the Council of State the naturalization is granted as matter of right.

As instancing the difficulties in the treatment of the Algerian population, and which we should endeavor to avoid in the treatment of our new population, especially that of the Philippines, may be cited the following example:

The Arab tribes in Algeria possessed lands in common, which belonged to the tribes as such, and in which the individual had no interest save by reason of membership in such tribe. Prior to the decrees of 1886 and 1889, certain shrewd, but not over-scrupulous, speculators purchased from a member of the tribe his interest in the tribal property. The purchaser, a French citizen, then invoked the principle of French law that no man shall be forced to remain a tenant in common and may always have the property divided among the co-owners by a judicial partition. Process was issued and the stolid Arab members of the tribe were duly served by the Huissier with the various legal papers incident to such a litigation. It is easy to imagine that the effect of service of process was not understood by the Arab, and that in all probability the ornamental blue paper, on which process is usually inscribed, was used for the purpose of igniting his pipe. In any event, after the prescribed time, judgment was taken by default, and the tribal property put up at auction, sold and the bulk of it applied to the payment of the legal expenses incident to the suit against the tribe. Of course this resulted in mere eviction from the communal land, and such abuses became so great and the injustice so manifest as to lead to serious revolts, and finally a special act of the 28th of April, 1887, provided some

remedies for these evils, but has not succeeded in eradicating them. The remedy sought by the special act was to apply the Mussulman law to this communal property regardless of whether the litigation was between natives or natives and French citizens.

We may well differentiate between the Porto Ricans and the very heterogeneous peoples of the Philippines. That Congress should accord full citizenship to the people of Porto Rico is but giving them their due. It seems probable that this will shortly be done (1913). The Philippine problem is wholly different and much more difficult and will not be discussed here.

VII

THE LAW AND OUR INDUSTRIAL DEVELOPMENT. THE RULE OF REASON

"The resolutions of the books upon these contracts seeming to disagree, I will endeavor to state the law upon this head, and reconcile the jarring opinions."

THESE are not the words of the Chief Justice of the United States in the Standard Oil case, however appropriately they might have been there used, but are taken from the opinion of Chief Judge Parker (later Lord Macclesfield) delivering the opinion of the Court of King's Bench in a case involving a contract alleged to be "in restraint of trade" in the year 1711 (*Mitchel v. Reynolds,* 1, P. Williams). It thus would appear that for some two centuries the subject has not been free from difficulties and that jarring notes at Bench and Bar are merely the healthy exuberances of free institutions in a progressive civilization.

Perhaps since Chief-Justice Taney announced the decision in the case of Dred Scott, no judgment

of the Supreme Court has evoked wider interest, suscitated more controversy, and elicited greater divergence of views than that in the case of the *United States v. the Standard Oil Company.*[1] Yet this case differs from the great epoch-making decisions of the Supreme Court of the United States, such as *Marbury v. Madison, McCullough v. Maryland,* the Dred Scott case itself, the Income Tax case, and the recent Insular cases, in that here no question of our organic law is involved. The Supreme Court was not required to pass upon any great question of constitutional or public law in pursuance of that great power conferred upon it by the Constitution and which is exercised by no other supreme tribunal of any of the great nations over their supreme legislature.

The decision of the court in the present case was in the exercise of one of the most elemental, indispensable functions of the judiciary—viz., the interpretation of statutes. In the terse and elegant English of Mr. Justice Holmes:

"Furthermore, while at times judges need for their work the training of economists or statesmen, and must act in view of their foresight of consequences, yet when their task is to interpret and apply the words of a statute their function is merely academic to begin with—to read English intelligently—and a consideration of consequences comes

[1] 221 U. S., 1.

into play, if at all, only when the meaning of the words used is open to reasonable doubt." (Northern Securities Co. v. The United States, 193 U. S., p. 401.)

Human ingenuity has as yet failed to draught a law of such precision and clarity that no man can be found who is not willing to draw its interpretation into question. This calls to mind the classic illustration of the leech who was prosecuted for having bled a patient in the town of Bologna, the law decreeing that "whoever drew blood in the streets should be punished with the utmost severity." The prosecution in that case evidently believed in the strict construction of the law, but even at that ancient date the more liberal view prevailed and the case was held not to be within the intention of the lawmaker. It has been well said that the pole star of judicial construction must be the intention of the legislature, however difficult this may be to ascertain. It is well put by Mr. Justice Swayne (23 Wall, 374-380):

"A thing may be within the letter of a statute and not within its meaning, and within its meaning though not within its letter. The intention of the lawmaker is the law."

That quaint old law-writer, Plowden, cites a case holding that a statute of Edward II enacting that a

prisoner "who breaks jail shall be guilty of felony" does not extend to a prisoner who breaks out when the prison is on fire, "for he is not to be hanged because he would not stay to be burned."

But in ascertaining the intent of the lawmaker and the object or purpose of a statute, not only the contemporaneous situation, but the historic past, will be examined to shed light upon that intention, where ambiguity or obscurity exists. A government in which there is no organ having power to determine questions arising under those general rules of human conduct which we call laws, would be necessarily anarchic. This is so generally recognized that the great French Code Civil (Code Napoléon) prescribes that no judge shall refuse to interpret a statute because of its obscurity or ambiguity.

The wide-spread interest in the trust cases is due to the fact that the question with which the statute deals—"monopoly"—has become the main political and economic problem of the day. The development of business in the United States necessarily requires that there shall be some legal rule by which the validity and legality of the large aggregations of capital shall be determined.

"Monopoly" is no new thing, nor is the dread which it at present seems to inspire peculiar to our

people, for we find that in A.D. 483 the Emperor Zeno issued an edict as follows:

"We command that no one may presume to exercise a 'monopoly' of any kind of clothing, or of fish, or of any other thing serving for food, or for any other use, whatever its nature may be, and if any one shall presume to practice a 'monopoly,' let his property be forfeited and himself condemned to perpetual exile. And in regard to the principals of other professions, if they shall venture in the future to fix a price upon their merchandise, and to bind themselves by agreements not to sell at a a lower price, let them be condemned to pay fifty pounds of gold."

Coming down to more recent times we find that the Court of King's Bench in 1711 declared that:

"Another reason is the great abuses these voluntary restraints are liable to; as, for instance, from corporations who are perpetually laboring for exclusive advantages in trade and to reduce it into as few hands as possible."

The English and American law reports contain many cases on *combinations* and *monopolies* at the common law and all of our States have some statutory enactments on the subject, many of them of very recent date and of drastic tenor.

In 1889 the attention of Congress was called to

the need for a federal law prohibiting monopolies, and the evils of the so-called trusts were debated and denounced in considering the bill introduced by Senator Sherman, which in somewhat amended form became the now famous Sherman Anti-trust Law.

The necessity for such a law, if the federal government intended to take any part in prohibiting monopolies, was manifest, since the federal courts have no common-law jurisdiction, but derive their powers from the Constitution and congressional statutes. This must be remembered when the question arises as to whether this act was merely declaratory of the general common-law rule as laid down by the courts of England and America or furnished another and broader one.

The sections of the act setting forth the offenses condemned are as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

The statute further provides for the use of the equitable remedy of injunction. While a court of equity has no inherent power to enjoin the commission of a criminal act, such powers may be and sometimes are conferred by statute. This act is thus endowed with a double aspect, civil and criminal. The more important cases in which the Supreme Court has passed upon it have come up by way of suit for injunctive relief against the alleged monopoly or combination, and the criminal features have been only incidentally considered.

While, technically speaking, debates may not be used as a means for interpreting a statute, yet, as the Chief Justice remarks in the Standard Oil case:

"That rule in the nature of things is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law, that is, the history of a period when it was adopted."

An examination of the debates makes it perfectly clear that Congress had in mind the great combinations in the necessaries of life which at that time were already exciting serious attention throughout the country. Senator Sherman evidently thought that his bill did nothing more than enact the common law which he believed amply sufficient to carry out the intention of Congress as to the restricting of monopolies. Speaking of his first draught of the bill, he says:

"It sets out in most specific language the rule of the common law which prevails in England and this country, especially declared by the Supreme Court of the State of New York in a very clear and able opinion, which I have here on my desk." (Bills and Debates in Congress relating to Trusts; Government Printing House, p. 15.)

It will be necessary to discuss hereafter the much-mooted point as to whether the Sherman law was declaratory, as this has been the question about which continuous controversy has raged since the passage of the act down to the time of the Standard Oil decision, which seems to have finally resolved that problem. At present it is sufficient to say that the combinations and monopolies which Congress had in mind were, generally speaking, not difficult of ascertainment; they evidently were the great

companies which had been denounced by political orators and political platforms for some time previous, and it was so stated time after time in the debates.

Before discussing the merits of the Standard Oil decision I will set forth briefly what the case decided and analyze the decision, which shows that:

(1) The interpretation of the court gives full effect to the intent of Congress, which intent must be read (a) in the light of the common law and (b) in that of contemporary history, and

(2) The controversy regarding the question as to whether or not the court has injected the word "reasonableness" into the statute is a mere word battle or logomachy due to a misconception of the decisions that have gone before and the true meaning of the utterances of the Chief Justice in the Standard Oil and Tobacco cases.

The bill of the United States against the Standard Oil Company, covering some hundred and seventy pages, sets forth the history of that organization and emphasizes the three phases through which it had passed. These phases were (1) the combination between individual firms prior to 1870 into a corporation known as the Standard Company of Ohio. This combination existed from 1872 or thereabouts to 1882, at which time, as the court found, the defendants then (2) entered into one of

those agreements which had come to be known technically as a "trust," by which the stock or interests in various concerns were transferred in trust to one company which acted for all. This arrangement was condemned by the Supreme Court of Ohio in a suit to dissolve the trust and thereafter (1889), (3), the company entered into its present status—viz., the operation of many subsidiary companies through the Standard Oil Company of New Jersey, a holding corporation, which had acquired and held a majority of the stocks of the various corporations engaged in purchasing, transporting, refining, shipping, and selling oil into and among the various States and Territories of the United States and thereby managed and controlled the same. It was this last phase which was charged as being peculiarly within the act, the earlier history of the company, especially that prior to the passage of the Sherman law being adduced simply as evidence of a continued and definite purpose, extending over some forty years, to drive out competitors and to monopolize the oil industry for the benefit of the small group of magnates who dominated it.

The court holds that the two sections of the statute, that relating to "restraint of trade" and that relating to "an attempt at monopolization," must be read together and that both had been violated by the acts of the defendants. The decision

of the circuit court, holding as an illegal restraint of trade and monopoly the combination formed by these numerous defendants and operating through the Standard Oil Company of New Jersey, was affirmed by the Supreme Court upon grounds which the Chief Justice tersely sums up as follows:

"(a) Because the unification of power and control over petroleum and its products which was the inevitable result of the combining in the New Jersey corporation by the increase of its stock and the transfer to it of the stocks of so many other corporations, aggregating so vast a capital, gives rise, in and of itself, in the absence of countervailing circumstances, to say the least, to the *prima facie* presumption of intent and purpose to maintain the dominancy over the oil industry, not as a result of normal methods of industrial development, but by means of combinations which were resorted to in order that greater power might be added than would otherwise have arisen had normal methods been followed, the whole with the purpose of excluding others from the trade and thus centralizing in the combination a perpetual control of the movements of petroleum and its products in the channels of interstate commerce.

"(b) Because the *prima facie* presumption of intent to restrain trade, to monopolize and to bring about monopolization resulting from the act of expanding the stock of the New Jersey corporation and vesting it with such vast control of the oil industry, is made conclusive by considering (1) the

conduct of the persons or corporations who were mainly instrumental in bringing about the extension of power in the New Jersey corporation before the consummation of that result and prior to the formation of the trust agreements of 1879 and 1882; (2) by considering the proof as to what was done under those agreements and the acts which immediately preceded the vesting of power in the New Jersey corporation, as well as by weighing the modes in which the power vested in that corporation has been exerted and the results which have arisen from it." (221 U. S. 1, 75.)

This result is concurred in by all the members of the court, and if the decision had been placed shortly upon the ground that the monopoly created by the acts so adverted to were within the statute the case would have evidently caused comparatively little discussion.

The decision is, however, of a more broad and general importance, because:

(1) It explains, and it is claimed limits, the general language of the statute so as to remove from its operation many cases which the literal terms of the law would indicate as falling within it;

(2) It is claimed to be in contradiction with rules theretofore laid down and fully established in prior decisions during the past fifteen years.

This view is emphasized and dignified by its statement with great earnestness in the opinion of

the then senior Justice of the court, Mr. Justice Harlan, who, while concurring in the conclusion reached, dissents from the reasoning of the court. So impressed was this venerable jurist with the reasoning of his brethren of the court that he feels himself bound "to say that what the court has said may well cause some alarm for the integrity of our institutions" and continues:

"I said at the outset that the action of the court in this case might well alarm thoughtful men who revered the Constitution. I meant by this that many things are intimated and said in the court's opinion which will not be regarded otherwise than as sanctioning an invasion by the judiciary of the constitutional domain of Congress—an attempt by interpretation to soften or modify what some regard as a harsh public policy. This court, let me repeat, solemnly adjudged many years ago that it could not, except by 'judicial legislation,' read words into the Anti-trust Act not put there by Congress, and which, being inserted, give it a meaning which the words of the Act as passed, if properly interpreted, would not justify. The court has decided that it could not thus change a public policy formulated and declared by Congress, that Congress has paramount authority to regulate interstate commerce, and that it alone can change a policy once inaugurated by legislation. . . .

"Nevertheless, if I do not misapprehend its opinion, the court has now read into the act of Con-

gress, words which are not to be found there, and has thereby done that which it adjudged in 1896 and 1898 could not be done without violating the Constitution—namely, by interpretation of a statute changed a public policy declared by the legislative department. . . .

"To overreach the action of Congress merely by judicial construction, that is, by indirection, is a blow at the integrity of our governmental system, and in the end will prove most dangerous to all."

The elaborate opinion of Chief Justice White is evidently designed to show that the course of decisions heretofore has been uniform and that whatever isolated expressions may be found as to the interpretation to be put upon the statutes the results reached in each case have adequately effected the intent of Congress.

The difficulty confronting the Chief Justice arose from the interpretation to be given the words "in restraint of trade." This language of the statute came before the Supreme Court for the first time in the now famous case of the *United States v. the Freight Association* (166 U. S., 290). That case involved a combination of railroad companies which had entered into an agreement fixing freight rates. The government attacked this combination on the ground that it was in restraint of trade. Mr. James C. Carter, with his extraordinary erudition and ingenuity, defended the combination on

two grounds: first, that the Sherman Act did not apply to railroad companies, as these companies were subject to regulation by act of Congress in a manner that did not apply to ordinary private corporations, and as public utilities were not within the fair intendment of the act, since the right which the State had to fix rates was inconsistent with the idea of a monopoly menacing to the public weal; and, second, that the record showed the rates to have been reasonable and proper and that, under the doctrine of the common law, of which the Sherman Act was merely declaratory, a contract which reasonably restrained trade was not involved. The first question was the one mainly discussed and the court found that the act was applicable to railroads. Incidentally I may say that our New York courts take what certainly seems, at least from an economic standpoint, the sounder view and exclude public utilities from the general category of monopolies and restraints on trade. (*Matter of Attorney General v. Consolidated Gas Company*, 124 App. Div., 401.) I cannot but feel that much of the difficulty and confusion from which the business of the country has suffered might have been avoided had the majority of the court assented to the latter view.

The court in the Freight Association case further held that they were unwilling to consider whether

the rates in question were in themselves reasonable, since the terms of the statute were absolute and categoric and forbade all restraints of trade whether reasonable or not.

"By the simple use of the term 'contract in restraint of trade,' all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress." (*United States v. Freight Association,* 166 U. S., p. 328.)

This utterance of the court was unnecessary to the decision of the case and was what is termed by lawyers an *obiter dictum,* a statement or argument not logically necessary for sustaining the conclusion or judgment reached, since the agreement would certainly have been invalid under the common law rule. I am convinced that it is this dictum in the opinion of Mr. Justice Peckham, writing for the majority of the court, which has led to the futile

and academic discussion as to the rule of "reasonableness."

The opinion in the Freight Association case in my view misapprehends the real scope of the common law. The common law, about which so much has been said, is not really difficult of ascertainment; its general propositions regarding this class of cases are clear enough, however difficult of concrete application.

There were three categories of illegal agreements restraining trade known to the common law:

(1) Contracts in restraint of trade;

(2) Combinations or conspiracies in restraint of trade; and

(3) Monopolies.

1. Contracts in restraint of trade had a fixed and definite meaning and are referred to in the Year Books, or law reports, of the fourteenth century. Such a contract was one by which a person selling his business or trade contracted that he would not further carry on such business. The object of the contract was to protect the vendee against the competition of his vendor, which might easily have made his purchase valueless. In the earliest times any such contract was held invalid, because the man who contracted not to carry on his trade was abridging his freedom and was liable

to become a public charge. Gradually, however, these agreements came to be recognized as valid within certain limitations. Where it was evident that the object of the agreement was merely to assure the vendee the possession of the good-will of his business and where the limitation was not such as to indicate that the primary object of the agreement was to monopolize the trade, but was merely a reasonable accompaniment of a contract of sale, it was held valid. The general rule consequently came to be that a partial restraint of trade would be valid while a general restraint was not. For instance, a baker selling his shop might validly contract that he would not carry on his trade in London, but he could not agree that he would not carry it on in England, as this would have been unnecessary to the protection of the vendee and hence unreasonable and oppressive, indicating the primary purpose of the agreement to be the creation of a monopoly rather than the protection of a business good-will.

With the changes in transportation and industry the question of partial or general restraint of trade lost much of its significance, and the query was whether the contract of restraint was "reasonable" or "unreasonable." This category of reasonableness at the common law is not vague and subjective, but is extremely concrete and clear. It was a question

for the court and jury in each case to decide upon the facts as to whether the contract in restraint of trade was merely collateral or ancillary to the contract of sale designed to protect the good-will of the business purchased. If so, such indirect or partial restraint of trade was considered as a reasonable exercise of the right of free contract. When, on the other hand, it appeared that such a contract had for its main object restraint of trade or practical monopoly, then, however adroitly the agreement might be phrased, the court would hold it an unreasonable exercise of the liberty of contract and void as directly restraining trade.

2. I am convinced that the court in the Freight Association case confused this very distinct class of contracts in restraint of trade with a very different legal category—namely, *combinations in restraint of trade.* By this term the common law indicated an agreement among various persons maintaining separate business establishments to fix or in some way regulate the prices or the output of the various establishments. Such contracts have been always and at all times contrary to the policy of the common law and to them no criterion of reasonableness was applicable. (See Justice Holmes's dissent, 193 U. S., 400.)

Agreements having for their object a direct restraint of trade, by interfering with the rights of

each of the parties thereto to sell at what price he pleased or restricting the output, necessarily fell within the inhibition of the law and were invalid. The rule is very clearly stated in an opinion of the Court of Appeals of New York. This case dealt with a combination between dealers of coal in the city of Lockport to fix the rate at which coal should be sold. The members of the agreement were indicted under the section of the Penal Code making it a misdemeanor to commit "any act injurious to trade or commerce." The same argument was used in defense of the combination as in the Trans-Missouri case, that the rates were *fair and reasonable.* The court evidently did not consider that there was any difference between the meaning of the statute and the general rule of common law, and dismissed the argument as to the reasonableness of rates by saying:

"But the question here does not, we think, turn on the point whether the agreement between the retail dealers in coal did, as matter of fact, result in injury to the public or to the community in Lockport. The question is, was the agreement, in view of what might have been done under it and the fact that it was an agreement the effect of which was to prevent competition among the coal dealers, one upon which the law affixes the brand of condemnation. . . .

"The gravamen of the offense of conspiracy is

the combination. Agreements to prevent competition in trade are in contemplation of law injurious to trade, because they are liable to be injuriously used. . . .

"The price of coal now fixed by the exchange may be reasonable in view of the interests both of dealers and consumers, but the organization may not always be guided by the principle of absolute justice. . . .

"If agreements and combinations to prevent competition in prices are or may be hurtful to trade, the only sure remedy is to prohibit all agreements of that character." (*People v. Sheldon,* 139 N. Y., pp. 263-265.)

Still more recently the common law doctrine has been lucidly expounded by the New York Court of Appeals in a suit brought on an agreement between producers of Hudson River bluestone, who controlled nearly ninety per cent. of the amount sold in New York. It was urged that the jury should be allowed to pass upon the reasonableness of the prices, but the court held the question immaterial in this class of cases and differentiated them from those contracts which involved the withdrawal of a vendor from business and in which the restraint was incidental to a sale rather than constituting the primary purpose of the agreement.

The court said:

"It may be conceded that one of its purposes was to enable the parties to obtain reasonable prices, but it gave them the power to fix arbitrary and unreasonable prices. *The scope of the contract, and not the possible self-restraint of the parties to it, is the test of its validity.* They could raise prices to what they supposed the market would bear, and as they expected to supply nearly the entire demand of the market, the temptation to extortion was unusually great.

"The plaintiff cites the cases which permit the vendor to sell his business with or without his plant, and to agree with his vendee that he will not by competition or other acts do anything to injure what he sells. . . . It may be conceded that the law, as now understood, restrains no one from selling his property, nor does it compel any one to continue a business which he can sell, or finds it to his interest to abandon, much less to continue it for any time or in any particular manner or place. However it may have been when trade was small, money scarce, opportunities and markets few, at present the public has little to fear from any individual renouncing his calling and business in favor of another, and seeking a new field of activity. Contracts between individuals to that effect are not in general restraint of trade. But the case before us is of a different kind. It is one of such a combination among many dealers as threatened a monopoly, with which the individual would be practically powerless to compete, and the many consumers who would be severally exposed and coerced

would be either compelled to submit to its exactions, or to forego the purchase of the commodity of customary use needful to them, and but for this monopoly obtainable in the market at a reasonable price. The same evil principle pervades both large and small combinations; all are alike offenders, differing in degree, but not in kind. And hence it is that contracts by which the parties to them combine for the purpose of creating a monopoly in restraint of trade, to prevent competition, to control and thus to limit production, to increase prices and maintain them, are contrary to sound public policy and are void." (*Cummings v. Union Blue Stone Co.*, 164 N. Y., pp. 404, 405.)

The emphasis placed upon the words "reasonable" and "the light of reason" by the court in the Standard Oil case was perhaps unfortunate. It is quite probable that for the words "reasonable" and "unreasonable" with regard to restraints of trade the words "direct" and "indirect" restraints could be advantageously substituted. This would put the test of validity in a clearer, less subjective and metaphysical light and distinguish between combinations which have for their primary purpose restraint of trade and those contracts which may incidentally restrain trade, but whose main object is the sale of a business.

The identity between the test of *reason* and that of *directness* is recognized by the Chief Justice in

the Standard Oil case, for he says, referring to the rule of reason:

"From this it follows, *since that rule and the result of the test as to direct or indirect, in their ultimate aspect, come to one and the same thing,* that the difference between the two is therefore only that which obtains between things which do not differ at all."

3. The third common law concept comprised in the statute is that of "monopoly." "Monopoly," strictly speaking, at common law could only arise from a Crown grant and is defined by Lord Coke as follows:

"'A monopoly is an institution, or allowance by the king by his grant, commission, or otherwise to any person or persons, bodies politic or corporate, of or for the sole buying, selling, making, working, or using of anything, whereby any person or persons, bodies politic or corporate, are sought to be restrained of any freedom or liberty that they had before, or hindered in their lawful trade.'"

It is quite evident that no such conception of *monopoly* is here involved and that the great combinations of to-day are not "monopolies" in this narrow sense, but are rather capitalistic aggregates whose size and consequent power permit them to effectually prevent any real competition and thus

effect those evils which the common law attributes to monopoly.

The purpose, however, of the common law was to preserve, as far as possible, freedom of contract, and it was felt that this was menaced either by a Crown monopoly, combinations in restraint of trade, or unreasonable contracts in restraint of trade. In addition to all these, there were at common law certain peculiar contracts called "engrossing" or "forestalling" which had for their object the obtaining of supplies of the necessaries of life with a view to completely controlling the market. These laws were repealed in the early part of the last century, but have an analogy in the anti-option laws found in some of our States.

Had the Supreme Court, therefore, in the Freight case and the Traffic case, considered the language of the act in the light of the common law meaning of the terms there used, they would have had no difficulty in coming to the conclusion that a combination of a number of persons or corporations for the purpose of fixing prices was contrary to the common law as known in England and America. The statement of the court in those cases that they were bound to take the language of the law literally and condemn all contracts in restraint of trade, whether reasonable or unreasonable, was founded upon an apparent misconception of the common law

and a failure to distinguish between "contracts" and "combinations." It is perfectly evident that the court was right in holding that, however reasonable the rates fixed by the Freight Association may have been, the very fact that the objective of the agreement was the fixing of rates made it illegal *per se*. So broad was the dictum of the court that—

"By the simple use of the term 'contract in restraint of trade,' all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade."

—it became necessary seriously to qualify it in the next case. In fact, Mr. Justice Peckham's opinion in the Freight case itself recognizes the distinction between "direct" and "indirect" contracts in restraint of trade, for he says:

"A contract which is the mere accompaniment of the sale of property, and thus entered into for the purpose of enhancing the price at which the vendor sells it, *which in effect is collateral to such sale, and where the main purpose of the whole contract is accomplished by such sale, might not be included, within the letter or spirit of the statute in question.*"

In the Joint Traffic case practically the same agreement was again brought before the court and

the question reargued by the same counsel; it was insisted that the construction of the court was such as to interfere with ordinary business and all real freedom of contract, and a number of instances were cited, such as the formation of a corporation to carry on any particular line of business by those previously engaged therein or a contract of partnership between two persons previously in the same line of business, to which the court replied:

"We are not aware that it has ever been claimed that a lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop, or the withdrawal from business of any farmer, merchant or manufacturer, restrained commerce or trade within any legal definition of that term; and the sale of a good-will of a business with an accompanying agreement not to engage in a similar business was instanced in the *Trans-Missouri case* as a contract not within the meaning of the act; and it was said that such a contract was collateral to the main contract of sale and was not entered into for the purpose of enhancing the price at which the vendor sells his business." (*U. S. v. Joint Traffic Assn.,* 171 U. S., 567, 568.)

And in commenting upon the case of *Hopkins v. United States* (171 U. S., p. 578), decided at that same term, in which it was held that the statute applies only to those contracts "whose direct

and immediate effect is restraint upon interstate commerce," the court said:

"An agreement entered into for the purpose of promoting the legitimate business of an individual or corporation, with no purpose to thereby affect or restrain interstate commerce, and which does not directly restrain such commerce, is not, as we think, covered by the act, although the agreement may indirectly and remotely affect that commerce.

"To suppose, as is assumed by counsel, that the effect of the decision in the Trans-Missouri case is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because, as they assert, they all restrain trade in some remote and indirect degree, is to make a most violent assumption and one not called for or justified by the decision mentioned, or by any other decision of this court." (*U. S. v. Joint Traffic Assn.,* 171 U. S., p. 568.)

If I have quoted fully from these cases, it is for the purpose of demonstrating that the court did not interpret the statute literally as forbidding all contracts or combinations which might incidentally restrain trade. The court there held, and held rightly, that the criterion of the statute was whether the restraint was a direct or an indirect one. As they refused to construe the statute literally the dictum in the Freight Association case that all contracts fall within its scope is scarcely

consistent with the remainder of the opinion, which, when read as a whole, is clear enough.

It appears, nevertheless, regrettable that the court distinguished between the scope of the common law rule and that of the statute and thus misconceived, as I think, the application of the word "reasonable." At common law it would have been no defense to any combination having for its object the fixing of prices to maintain that those prices were reasonable, and the court in deciding this defense to have been unsound did not go beyond the common law. The expressions referred to in Mr. Justice Peckham's opinion explain the not unnatural popular misapprehension as to the meaning of the word "reasonable," and the present criticism that the court has at this late date, after fifteen years of adjudication, now for the first time read that word into the statute.

Had Senator Sherman's original law stated that "(1) all contracts in unreasonable restraint of trade and (2) all combinations and conspiracies in restraint of trade are illegal and void," it would have declared the common law rule both with accuracy and discrimination.

It is evident that the simple distinction between "direct" and "indirect" contracts in restraint of trade effects the intention of Congress, which was not to paralyze the industries of the country by

(to use Mr. Justice Peckham's language) "a most violent assumption," but was to prevent those agreements whose primary object was restraint.

It has been argued popularly and the point has been raised in various cases that restraint of trade and restraint of competition do not mean the same thing. This point is fanciful rather than real. Restraint of trade, as the history of that term at the common law shows, included any restriction by which any individual or individuals should, by voluntary act or otherwise, be inhibited from carrying on their trade or business in their own way, which is equivalent to restraint of competition, and the courts have uniformly so considered it. There is, however, this truth in the suggestion that there may well be indirect restraints of competition which may not in themselves restrain trade. This, however, is only illustrative of the fact that the distinction between the two classes of contracts and combinations is that between those which restrain directly and those whose restraints are merely indirect and ancillary to some other purpose.

This view is emphasized by the important case of the *United States v. Addyston Pipe and Steel Company,*[1] which dealt with a combination of manufacturers for the purpose of dividing the territory in

[1] 85 Fed. Rep., 271.

which their product was to be sold. In the Circuit Court of Appeals the opinion was rendered by Judge Taft, who held such an agreement to be a combination in direct restraint of trade and to fall within the statute. He reviewed in very exhaustive fashion the prior cases and delved deep into the common law, finally concluding that a combination among a number of persons engaged in a particular business to stifle or prevent competition and thereby to enhance or diminish prices to a point above or below what they would be if left to the influence of unrestricted competition is contrary to public policy as found either at the common law or in the statute. In this very case it was urged that the prices at which cast-iron pipe was sold were reasonable, to which Judge Taft answers:

"We do not think the issue an important one because, as already stated, we do not think at common law there is any question of reasonableness open to the courts with reference to such a contract. Its tendency was certainly to give defendants the power to charge unreasonable prices had they chosen to do so."

When that case came to the Supreme Court the question mainly considered was whether the agreement so directly affected interstate commerce as to fall within the statute. This being decided in

the affirmative, the combination was declared illegal.[1]

The views of Judge Taft are also those of President Taft, since in a recent message he said:

"It has been proposed, however, that the word 'reasonable' should be made a part of the statute and then that it should be left to the court to say what is a reasonable restraint of trade, what is a reasonable suppression of competition, *what is a reasonable monopoly*. I venture to think that this is to put into the hands of the court a power impossible to exercise on any consistent principle which will insure the uniformity of decision essential to just judgment. It is to thrust upon the courts a burden that they have no precedents to enable them to carry, and to give them a power approaching the arbitrary, the abuse of which might involve our whole judicial system in disaster."

The message has been quoted as in conflict with the views of the Chief Justice, but I do not think there is any real conflict. Of course there could be no "reasonable" monopoly, since, as the Chief Justice points out, the very objective both of the common law and the statute is monopoly. The test of reason merely applies to the question whether the combination or contract aims at or tends to monopoly. The use of the word "direct" and the elimination of such a vague phrase as "the

[1] 175 U. S., 211.

light of reason" would have greatly clarified the situation.

In *Swift v. United States*,[1] a combination of beef-packers was equally held invalid, and it was quite clear that the combination would have been invalid at common law.

The famous Northern Securities case involved a different state of affairs, in that a holding corporation was devised for the purpose of controlling both the Great Northern and the Northern Pacific Railway companies. A grave constitutional problem was involved as well as the question whether the creation of a corporation for holding the stock of both companies was a combination within the Sherman Act. The majority of the court held that, although the modern form which the transaction had taken differed from the combinations theretofore before the court, it was still in effect a combination, the object of which was to create a monopoly and hence within both sections of the act.

Mr. Justice Brewer, however, in concurring with the majority of five whose votes were necessary to the affirmance of the decree against the railroads, dissented from much that was said in that case. His opinion is interesting in that it again raised the perennial question of reasonableness. Refer-

[1] 196 U. S., 375.

ring to the Freight Association case, while he thinks that decision correct, he yet says:

"Instead of holding that the Anti-trust Act included all contracts, reasonable or unreasonable, in restraint of interstate trade, the ruling should have been that the contracts there presented were unreasonable restraints of interstate trade, and as such within the scope of the act. That act, as appears from its title, was leveled at only 'unlawful restraints and monopolies.' Congress did not intend to reach and destroy those minor contracts in partial restraint of trade which the long course of decisions at common law had affirmed were reasonable and ought to be upheld. *The purpose rather was to place a statutory prohibition with prescribed penalties and remedies upon those contracts which were in direct restraint of trade, unreasonable and against public policy. Whenever a departure from common law rules and definitions is claimed, the purpose to make the departure should be clearly shown. Such a purpose does not appear and such a departure was not intended.*" (*Northern Securities Co. v. U. S.*, 193 U. S. at p. 361.)

Mr. Justice Brewer, like the present Chief Justice, found some of the language of the Freight Association and Joint Traffic cases so sweeping as to be of a misleading character and felt that the test of reasonableness or directness should have been more explicitly stated. General expressions

in opinions are often dangerous, and certainly the expressions used in the Traffic cases have caused a great deal of difficulty and confusion both at the bar and in the world of business. They well illustrate the wisdom of limiting an opinion to the discussion of those matters necessary to a disposition of the case at bar; otherwise they may, to use the happy phrase of Mr. Justice McKenna, "like the exhalations of a marsh, shine to mislead." (*De Lima v. Bidwell*, 182 U. S., p. 205.)

Even after the decision of the Northern Securities cases, the question still remained whether certain large concerns, which, claiming to be the result of natural and normal growth, and disclaiming all intention of driving others from the field or of monopolizing any branch of trade, fell within the act. If the act were to be interpreted with the scrupulous literal accuracy evinced by some of Justice Peckham's dicta, it might reasonably have been supposed that every business in the country, which had in any fashion absorbed the trade of its competitors, was obnoxious to the law.

So doubtful did the bar and the bench feel in regard to this statute that the presiding judge of the Circuit Court of Appeals in the case of the *United States v. American Tobacco Company* voiced at least the popular view as to the construc-

tion theretofore placed upon the statute by the Supreme Court as follows:

"Disregarding various dicta and following the several propositions which have been approved by successive majorities of the Supreme Court, this language (every contract, combination, etc.) is to be construed as prohibiting any contract or combination whose direct effect is to prevent the free play of competition, and thus tend to deprive the country of the services of any number of independent dealers, however small. As thus construed the statute is revolutionary. By this it is not intended to imply that the construction is incorrect. . . . The act as above construed prohibits every contract or combination in restraint of competition. Size is not made the test: Two individuals who have been driving rival express-wagons between villages in two contiguous states, who enter into a combination to join forces and operate a single line, restrain an existing competition; and it would seem to make little difference whether they make such combination more effective by forming a partnership or not." (164 Fed. Rep., pp. 701, 702.)

Under these circumstances, the result of the Standard Oil case was awaited with tense anxiety, and it was a cause of general gratification that the judgment was unanimous. It was, however, unfortunate both for the court and for the nation that Mr. Justice Harlan felt constrained to dissent

from the reasoning of his brethren of the court. As he had concurred with the majority of the court in the Freight Association case and the Joint Traffic case, it is evident that even he did not read the statute with complete literal accuracy as applying to all contracts in restraint of trade, for he took no exception to Mr. Justice Peckham's view that contracts which merely incidentally restrained trade were not within the statute.

The Chief Justice certainly endeavored to deduce from the language and history of the statute and from the foregoing cases some rules by which it might be possible, with a reasonable degree of accuracy, to predict what transactions fall within the act. He analyzes with minuteness and care the English law and concludes that the English decisions and statutes were directed against monopolies and those contracts which may be considered to have resulted in some of the injurious consequences ascribed to monopolies. It hence came about that contracts or acts which were considered to have a monopolistic tendency, especially those which were thought to unduly diminish competition and thus to enhance prices (in other words, to monopolize) came also in a generic sense to be spoken of and treated as they had been in England, as restricting the due course of trade and therefore as monopolies generally. It is difficult to abridge

or paraphrase his *résumé,* therefore I quote it *in toto:*

"In view of the common law and the law in this country as to restraint of trade, which we have reviewed, and the illuminating effect which that history must have under the rule to which we have referred, we think it results,

"(a) That the context manifests that the statute was drawn in the light of the existing practical contracts which were in restraint of trade because it groups as within that class, not only contracts which were in restraint of trade in the subjective sense, but all contracts or acts which theoretically were attempts to monopolize, yet which in practice had come to be considered as in restraint of trade in a broad sense.

"(b) That in view of the many new forms of contracts and combinations which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation. The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint.

"(c) And as the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination which could be made concerning trade or commerce or the subjects of such commerce, and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated. Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided."

These conclusions certainly seem to give full effect to the intention of Congress, which was to confer upon the federal courts power to prevent monopoly and the wrongs incident to attempts to monopolize, adding to the common law invalidity of such agreements the sanctions of criminal law.

It may be regrettable that the Chief Justice uses the terms "unreasonable," "undue," "the light of reason," and "direct" and "indirect" as meaning one and the same thing, thus seeming to create a somewhat vague standard, but the Chief Justice certainly does not mean the "reason" of each individual court or judge, nor any philosophic conception of "light of reason." It is generally held that public service corporations cannot have their charges reduced by the legislature beyond what is reasonable. This criterion has not been found impracticable or even very difficult of application. Whether certain State requirements are proper exercise of the police power or interferences with interstate commerce is a matter which depends upon the reasonableness of the regulation, or, in other words, whether the effect upon such commerce is merely incidental or indirect. (*Smith v. Alabama,* 124 U. S., 465.)

From the analysis already made it seems to us that the language of the statute and the results of all the decisions as to the Anti-trust Act bear out the view *that all contracts and combinations which directly tend to restrain trade are unlawful, and that all attempts to monopolize, brought about by whatever methods, whether old or new, are equally within the statute.*

It may, nevertheless, be thought that these criteria

are of so general a character as to be of little value in predicting the results in specific cases. This is undoubtedly true, and yet I submit that, under the circumstances, the court could not have dealt with the statute in any other way. It has been urged that it would be probably illegal and certainly immoral to indict any one for having unreasonably restrained trade, since the criminal law should be sufficiently certain to give persons some definite notice as to what constitutes its infringement. While this argument has seeming force, many statutes are equally and perhaps unavoidably as vague. One is forbidden, under severe penalty, from driving negligently along the highway, and it is for the judge to charge the jury what constitutes negligence. So it must, under this statute, be for the judge to charge the jury as to what constitutes combinations in restraint of trade or an attempt to monopolize. A monopoly in the modern sense is a capitalistic monopoly and may be no more than a great aggregate of wealth concentrated under one control which renders in actual practice all real attempts at competition ineffective.

The decision in the case of the *United States v. American Tobacco Company* (221 U. S., 106) but reaffirms and reiterates the doctrine enunciated in the Standard Oil case and applies it to a more complex and difficult situation. The Chief Justice in

that opinion explains the necessity for a fair and liberal construction of the statute, one which will carry out the intent of Congress to check monopolies while not interfering with those ordinary and normal contracts which it was the object of the statute to protect. The view of the Chief Justice may be summed up by saying that a liberal construction of the statute alone will make it really effective, and as so construed it must be declaratory of the common law rule which had in view the same purpose as the act—namely, the protection of freedom of contract against impairment by monopolies. A narrow, literal construction would thus not only be anti-historic, but wholly nugatory of the intent of Congress, in that it would paralyze that ordinary and natural trade development whose main purpose it was to safeguard. The Chief Justice thus appositely puts it:

"The soundness of the rule that the statute should receive a reasonable construction, after further mature deliberation, we see no reason to doubt. Indeed, the necessity for not departing in this case from the standard of the rule of reason which is universal in its application is so plainly required in order to give effect to the remedial purposes which the act under consideration contemplates, and to prevent that act from destroying all liberty of contract and all substantial right to trade, and thus causing the act to be at war with itself by annihilating the fun-

damental right of freedom to trade which, on the very face of the act, it was enacted to preserve, is illustrated by the record before us."

It is possible that in future the criminal feature of the law will be more largely relied upon by the government as a deterrent to monopoly. In this event the question of criminal intent will evidently be of very great importance. The general legal doctrine is that there is no crime without intent, but this is only a rule of construction which may be negatived by the legislature. There is a class of cases in which the courts have held that the plain language of statutes made immaterial the question of intent. In such cases the fact that the persons charged have violated the express prohibition of the law is sufficient ground for conviction. A typical case of this kind is one arising under the statute of New York preventing the sale of impure or adulterated milk. While it was admitted that adulterated milk had been sold, proof was offered that this was without the knowledge, and therefore the intent, of the defendant, to which the Court of Appeals answers:

"As the law stands, knowledge or intention forms no element of the offense. The act, alone, irrespective of its motive, constitutes the crime. . . . Experience has taught the lesson that re-

pressive measures which depend for their efficiency upon proof of the dealer's knowledge and of his intent to deceive and defraud are of little use and rarely accomplish their purpose." (*People v. Kibler,* 106 N. Y., pp. 323, 324.)

While it still is open to question whether the Sherman Law is in the same category, yet, where a monopoly has been actually created, it will probably be well-nigh impossible for defendants to escape upon the ground of lack of intent. Persons are always presumed to have intended the natural effect of their acts, and the doctrine of intent even where applied, especially in cases of purely statutory delinquencies, has been beaten out very thin.

There may be and probably are sound objections to the statute on economic grounds, but I do not believe that it can be successfully challenged upon the ground of vagueness or uncertainty. It has always been difficult to draw the line between "direct" and "indirect" contracts and combinations restraining trade. The difficulty is more acutely and generally pressing to-day because of the approach to actual monopoly in so many of the necessaries of life.

I cannot think that Mr. Justice Harlan was justified in considering the present decision as really at variance with former decisions. Taking these decisions together as a coherent whole, there can be

little or no doubt that the result reached in every one was similar to that which would have been reached upon the assumption that the statute was merely declaratory of the common law. It seems deplorable that so much confusion should have arisen over what now appears to have been a battle of words.

Here again we find the continuing conflict in society between justice and certainty. The warfare against modern monopoly is being carried on with the rusty weapons of medieval England, and any confusing economic result should not be attributed to our courts. No other result is to be hoped for while legislators, instead of giving these great problems intelligent, constructive consideration, weighing the economic advantage of unified and concentrated production against the social ills which may arise from suppressing great numbers of small producers, content themselves with redeclaring the ancient doctrines, which, if they were ever adequate to cope with the problem, seem quite insufficient as a solution of the economic problems confronting us at the present time.

The Sherman Law, if construed absolutely and literally, according to the most approved Chinese method, would result in complete economic stagnation. Interpreted rationally in the sense intended by its originator, as declaratory of well-settled rules

of common law, it will not annihilate business nor even perhaps very seriously impair its development. It is, however, calculated to leave the whole question of "monopoly" and "combinations in restraint of trade" in an uncertain condition necessarily resulting in suits and prosecutions in which courts and juries must determine in every case whether there was restraint of trade or attempt to monopolize, and all this with results of very doubtful value to the community.

The cases decided since those here discussed have added little new law or light. In each case the Supreme Court is in effect acting as a jury, passing upon the peculiar facts to determine whether restraint of competition was the direct result or a mere incident, a by-product of circumstances intended to primarily effect other results than monopoly. The real difficulty lies in the fact that the nation has not as yet thought out any intelligent legislative programme which will adequately deal with new and largely untried economic conditions.

VIII

PERVERSION OF PRECEDENT. *STARE DECISIS.* HISTORY MISINTERPRETED

WE have seen that the Doctrine of *Stare Decisis* may maintain rules of law long after the grounds on which they were based have passed away. We will now see that errors as to historical situations may be imbedded in the law so firmly, by reason of reverence for precedent, that they are even transplanted over seas to flourish in America. An instance of this is found in the judicial development (or curtailment) of "riparian rights."

"Riparian rights" is a broad term. It is a category dealing with an almost inexhaustible variety of situations and possibilities; and even an elementary treatise on the subject would require many pages. Lest, however, the reader take alarm at this apparently sinister preface, I hasten to add that what will here be discussed is a very small incident in that vast domain of law treating of those peculiar rights, neither wholly terrestrial, nor entirely aquatic, which might almost be denominated

amphibious. Etymologically, the term "riparian rights," should refer especially to rights in rivers, but the alliance between law and etymology, never very close, has of late years, in our overworked law courts, and at the hands of our non-technical legislators, been severely strained. Consequently, I need scarcely apologize for saying that the class of riparian rights here treated has no reference to rivers, as such, but deals entirely with the foreshore or beach: viz., that portion of land which, lying between the low and high-water mark on a tide-washed shore, becomes alternately land and water. The term "littoral" is sometimes applied with greater accuracy to this situation, but the term "riparian" seems to be now consecrated by legal usage, and I do not sufficiently possess the temper of the reformer to attempt to change it.

Riparian questions have often played a great rôle in our jurisprudence. The rule of navigability has been extended to the great fresh water lakes, new conditions having made new law. The English common law test of navigability, once found inadequate, has been repudiated, although it had been sanctioned by a decision of the Supreme Court.[1]

The great rivers, forming highways for commerce between our States, have often been the sub-

[1] *The Genesee Chief* (1851), 12 How., 443.

ject of jealous controversy between the States whose territory they wash. The Supreme Court of the United States in the case of *Kansas v. Colorado* [1] has said that in dealing with these questions, it sat rather as an international tribunal than as a merely domestic one, dispensing international rather than common law, and unfettered by the ordinary technicalities of municipal law. Later, at a further stage of the same important litigation, in answer to the claim of the Attorney-General that the United States has an inherent power to regulate questions of irrigation, the court made the timely reply that the government of the United States was still one of enumerated powers only, possessing no inherent sovereignty; that the proposition advanced by the representative of the United States government that there are legislative powers which belong to the nation although not expressed in the constitutional grant of powers, was in direct conflict with the constitutional principle that this is a government of enumerated powers; and the proofs that this is such a government clearly appear from the Constitution, even independently of the amendments, for otherwise, an instrument granting certain specified things would by construction be made operative to grant other and distinct things.

[1] (1902) 185 U. S., 125, at 146.

"With equal determination the framers intended that no such assumption should ever find justification in the organic act." [1]

Thus has the mere question of riparian rights called forth from our supreme tribunal emphatic repudiation of the doctrine that the federal government may have powers outside of and beyond the scope of the Constitution.

Again, there are other phases of the law of riparian rights which have involved the broadest questions of constitutional law. How far such rights may constitute property, and how far such property may be taken without compensation, have formed the subject of notable State and federal adjudications.

The question directly treated in this chapter, although apparently a simple one, has been in dispute for many years. It may be stated thus: has the owner of land abutting upon the sea, or an arm of the sea, in which the tide ebbs and flows, the right to construct, for his own use, a dock giving him access to the navigable portion of the stream? It must, indeed, seem strange to those not versed in the judicial literature of the subject that this question, until a very short time ago, was still unsettled in New York State. It has long been a

[1] *Kansas v. Colorado* (1907), 206 U. S., 46, at 90.

bone of contention in many other States also, and many decisions involving the question have appeared to be conflicting and confusing. The unsettled condition of the law upon the subject has led to bitter controversies in many sea-shore communities for several generations past, yet it was only finally in March, 1907, that the Court of Appeals of this State definitely established as a rule of property the proposition that the

"riparian owner whose land is bounded by navigable waters has the right of access thereto from the front of his lot, and such right includes the construction of a pier on the land under water, beyond high-water mark, for his own use or for the use of the public, subject to such general rules and regulations as Congress or the State Legislature may prescribe for the protection of the rights of the public." [1]

The fact that the decision was reached by a divided court, three of the seven judges dissenting, can but add interest to the question and illustrate the uncertain state of legal opinion upon the subject.

The history of the controversy goes back to a remote time. It is apparently one of the most ancient in English law. A short sketch of it may not be uninteresting as indicating how slavishly in

[1] *Town of Brookhaven v. Smith* (1907), 188 N. Y., 74 (Headnote 1).

some respects our law has followed ancient precedents originating at a time when social and political conditions were far different from our own; and with what difficulty we are able to make new departures, more consistent with the needs of modern society.

In England, rights in the foreshore have been a subject of legal contention almost since the Norman Conquest. Prior to that momentous event, a riparian owner under the Saxon law apparently held his land undisturbed and unfettered down to the low-water mark. The claim of the Crown to the *jus privatum,* or private ownership in the foreshore, as opposed to the *jus publicum,* or right of the King as a mere trustee for the public, which was always recognized, does not appear to have been developed prior to the sixteenth century.

Crown prerogative and royal property formed one of the elements of the policy of Tudor and Stuart kings. Unoccupied land, fishing rights, wrecking rights and the soil of the foreshore fell within the range of their covetousness, and able Crown lawyers were soon found, ambitious and ingenious enough to devise theories and fictions by which the King could lay claim to the land between the low and high-water mark; but it remained for the judges of Charles I finally and definitely to de-

clare as law the theory that the King alone owned the foreshore.

The study of the history of legal institutions has been said to tend to make one a legal skeptic. The history of the English law is admirably illustrative of the development of legal theories and their erection into principles or rules which come to be clothed with an almost sacred character, yet whose origin upon examination is sometimes found to be based upon a misconception of a historic situation. Principles of property, or family law, whose supposed antiquity leads to their being treated as elementary, often prove to be of comparatively recent origin and to reflect radical changes in the social and economic balance or structure of society. The doctrine of the English law for more than two centuries has been that the King was presumed to own the foreshore, and this presumption could not be rebutted save by the exhibition of an actual Crown grant to the claimant or his predecessor in interest. This doctrine, termed the "*prima facie*" doctrine, is stated in Blackstone and in the usual standard textwriters in England and America as a settled proposition historically and legally sound. That this was historically false and that the doctrine had its origin in the usurpation and greed of the Stuart kings and in the subservient ingenuity of the Crown lawyers, has been left to modern scholar-

ship to demonstrate. The discovery and publication of old grants and court records have thrown new light upon the subject, and instructive reference to them may be found in the scholarly and erudite work of Mr. Moore on the history of the law of the foreshore and seashore.[1]

Moore appears to have successfully demonstrated that prior to the Norman Conquest the Saxon lands were in fact, if not in name, manors, and that the riparian proprietors owned either to the thread of the stream or to the low-water mark, as the case might be. After the Conquest, the large Saxon landholders were not disturbed, and their grants were in large part either confirmed or their substance incorporated into such new grants as were made. There is no evidence that the Norman or Angevin kings made any claim to the foreshore except when they themselves were lords of a particular manor. Mr. Moore says:[2]

"Instead of it being true that the Crown retained the foreshore when granting out its dominions, it is more probably true that the Crown did actually grant it out by its original grants of almost every manor in the kingdom, and consequently that the theory of the *prima facie* title is one on which little reliance can be placed."

[1] Moore, History and Law of the Foreshore and Seashore.
[2] Moore, *supra*, 3d Ed., page 29.

Evidently that quaint and charming old writer, Bracton, did not recognize this *prima facie* theory as part of the English law in his day, for in his Institutes he leaves out that portion of Justinian's work which claims for the Imperial power the right to the foreshore.

The theory of the kingly ownership of the foreshore was invented by an ingenious Crown lawyer, one Thomas Digges, in the reign of Elizabeth. His claim was that the foreshore belonged to the Crown, not as other royal property, but as part of the royal prerogative, and he supported it in a learned thesis on the subject, based upon an assumption of a state of facts of which there is no proof, and the reverse of which almost certainly existed. Before the reign of Queen Elizabeth the true presumption of fact with regard to the ownership of the foreshore should have been the exact reverse, namely, that it was in the riparian owner rather than in the Crown. It appears that during the reigns of Elizabeth and of James I, in a number of cases, the Crown claim to foreshore ownership was made by astute lawyers, filled with zeal to enlarge the royal jurisdiction; but all these cases seem to have been unsuccessful until the famous case of *Attorney-General v. Philpot,*[1] in 1628, which, we

[1] *Attorney-General v. Philpot* (1628), reported only in Moore, *supra,* page 262 *et seq.*

may say in passing, is mentioned in the dissenting opinion in the *Brookhaven* case as the leading English case establishing that doctrine. That case does not appear to be reported, but Mr. Moore has found the manuscript record, and gives it *in extenso* in his exhaustive work. It is extraordinary that it should be the foundation of a rule of property law, which until 1907 was the law in the State of New York, when we reflect that the case was decided by judges, some of whom sat in the famous Ship Money case, and upon whom history has placed a heavy load of obloquy. The decision was apparently procured, as the Ship Money judgment had been, by the personal pressure of Charles I for the purpose of obtaining for the Crown, properties and revenues to which it had no just title. The claim, says Mr. Moore,

"was founded in untruth and injustice, and the too great insistence upon it by King Charles I unquestionably was one of the causes of the great Revolution."

Sir Thomas Townsend, writing to a friend as to the *Philpot* case, intimates that it will be properly disposed of "when some of the barons have received directions from the King." The case itself seems to have been a moot case, contrived by the Stuart monarch for the purpose of obtaining a de-

cision which might bring him needed revenues. The Crown lawyers raised the question by making a lease of a piece of foreshore to one Cornelius Vanderbilt, with a view to establishing legal title by an action. It appears an odd coincidence that the Court of Appeals two centuries later in the case of another Vanderbilt,[1] should have declared as New York law, the proposition advanced by an earlier Vanderbilt on behalf of Charles I in the *Philpot* case.

That a decision rendered under such circumstances should have stood as law in the United States for more than a century, is a strong commentary upon the conservatism of our judges, and perhaps, incidentally, upon their lack of knowledge of or indifference to history, at least as found outside of the reports of the law courts.

The "Grand Remonstrance" of 1641 is almost as noteworthy a landmark in the history of English liberty and constitutional law as the Great Charter itself, yet how many judges who have learnedly considered these questions have had in mind the Twenty-sixth Article of that memorable document, charging the King with "taking away of men's rights under color of the King's title to land between high and low-water mark?"

After the downfall of the Stuart tyranny the

[1] *People v. Vanderbilt* (1863), 26 N. Y., 287.

claim seems to have been abandoned, or at least not pressed for many years, and the judgment in the *Philpot* case itself was apparently never executed, owing doubtless to the advent of the Revolution. There were, as there had been before, numerous cases relating to interference with the *jus publicum*, but we must wait many years before we find another precedent for the Stuart doctrine of *jus privatum*. It has always been admitted that the *jus publicum* was inalienable, and in examining the early cases care must be taken to distinguish between the two.

The theory of the Crown lawyers was, that the King in his capacity as representative of the whole realm was charged with the duty of safeguarding the right of the public to navigate tidal waters or to use the foreshore for fishing purposes, etc., but that in addition to this merely public function he possessed in his own right, as the general residuary owner of all the soil in England, the *jus privatum*, or title to the soil of the foreshore, which conferred upon him the right either to alienate or to use this property in any way not incompatible with the *jus publicum*. The difference between the two is clearly and adequately instanced in the next case which we find adopting the doctrine of the *Philpot* case. This case is the *Attorney-General v. Richards*,[1] decided in 1795. The Crown had proceeded

[1] 2 Anstruther 603.

by information to obtain a decree abating a dock or quay erected upon the foreshore of Portsmouth Harbor by the riparian owner. The action seems to have proceeded upon the double ground, first that the structure was a nuisance, and therefore obnoxious to the *jus publicum,* and second, that it was a purpresture, that is to say, an erection or enclosure on the King's soil, and hence summarily abatable as such. The defendant, in answer to the first point, claimed that he should have had a trial by jury, and, as to the second, endeavored to show evidence of a grant of the foreshore and ancient usage. The court apparently thought the answer to the first question adequate, but granted a decree in favor of the Crown on the ground that "the soil is the property of the Crown." The court, nevertheless, indicates some little squeamishness as to following the *Philpot* case, for it says: [1]

"It is objected that this case was in the time of CharlesI; but it must be remembered that Lord Hale determined some of them, and approved the rest."

It does not appear to have been noted by our courts that the *Richards* case was later than our adoption of the common law, and that at the time when the common law became a part of the law of the State of New York, the famous (or infamous)

[1] At page 616.

Philpot case was the only authority for the doctrine that the erection of a pier on the foreshore by a riparian owner was *per se* abatable as a purpresture.

Johnson v. Barret[1] is also generally cited as upholding the prerogative doctrine, but the report is incomplete and the subsequent history of the dispute proves that the obstruction made navigation dangerous "to ships in the ebb tyde."

The English law itself has been somewhat modified of late years, and now a riparian owner may not be cut off from his access to the water.[2]

The case of *Parmeter v. Gibbs*[3] followed *Attorney-General v. Richards,* and simply maintained the *prima facie* doctrine as law in England. Sir Matthew Hale, who wrote his famous treatise on the subject in 1786, and who has been cited as the most respectable authority for the proposition, does not seem to have himself believed that the Crown historically was the owner of the foreshore, but merely that there was a presumption of law to that effect in the absence of contrary proof.

It is impossible here to trace the doctrine of the *jus privatum* in its various ramifications through-

[1] (1647) 3. Aleyn K. B. Reports, 10.

[2] *Buccleuch v. Metropolitan Board of Works* (1872) L. R. 5 H. L. 418; *Lyon v. Fishmongers Co.* (1876) L. R. 1 App. Cas. 662.

[3] (1813) 10 Price, 412.

out the United States. We will confine ourselves to a brief synopsis of its history and development in the State of New York and its final burial by the Court of Appeals in the *Brookhaven* case, after two hundred years of noxious vitality.

Before adverting to the New York cases, however, there are three important decisions of the Supreme Court of the United States involving the doctrine. They are in the order of time as follows: *Yates v. Milwaukee;*[1] *Shively v. Bowlby;*[2] *Scranton v. Wheeler.*[3]

It is needless to consider here how far these cases are reconcilable. Suffice it to say that the advocates of the doctrine that a riparian owner has no wharfage privilege, claim that the expression to the contrary in *Yates v. Milwaukee* is a mere dictum. That oft-quoted expression was written by Mr. Justice Miller and is as follows:[4]

"Whether the title of the owner of such a lot extends beyond the dry land or not,[5] he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; and among those rights are access to the navigable part of the river, from the front of his lot, the right to make

[1] (1870) 10 Wall. 497.
[2] (1894) 152 U. S. 1.
[3] (1900) 179 U. S. 141.
[4] Page 504.
[5] The italics are the writer's.

a landing, wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public, whatever those may be * * *. This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and, if necessary that it be taken for the public good, upon due compensation."

The disclaimer by the court of the relevancy of the question whether the riparian owner had title to the foreshore is most significant, since, had the court held the English view of *jus privatum,* the dock, if the foreshore was not in the riparian owner, would have been an erection upon the soil of the King (or his successor, the grantee) and hence summarily abatable as a purpresture.

It has been claimed in the *Brookhaven* case that this expression of the court in the *Yates* case has been the origin of nearly all the *dicta* in the New York reports to the same effect. However that may be, the doctrine has itself now finally been adopted in New York.

In *Shively v. Bowlby,* a characteristically exhaustive and learned opinion was written by Mr.

Justice Gray. He comes to the conclusion, after citing copiously from Lord Hale and some of the English decisions, that

"by the law of England, also, every building or wharf erected without license, below high-water mark, where the soil is the King's, is a purpresture, and may, at the suit of the King, either be demolished, or be seized and rented for his benefit, if it is not a nuisance to navigation." [1]

We thus have here a most unqualified statement of the Stuart doctrine of *jus privatum*. The learned Justice further reviews the law in the different States and finds considerable diversity upon the question as to the rights of the riparian owner in the land below high-water mark. The real question, however, involved in the case was, whether grants made by the territorial government while Oregon was a territory passed title to the foreshore, so that the government of the State was precluded from claiming it after the territory was admitted. In final analysis, this case merely declares the law of Oregon to be that of the *prima facie* doctrine as to the ownership in fee of the beach.

In the later case of *Scranton v. Wheeler*, the question involved was whether the United States government, for the purpose of improving naviga-

[1] At page 13.

tion, might erect a pier which would interfere with the access of the riparian owner to the navigable portion of the stream. The authorities were reviewed fully, and it was held that, although a riparian owner has a right of access, his access must be held in subordination to the right of the government to improve navigation. The court so phrased their view of the law:[1]

"If the riparian owner cannot enjoy access to navigability because of the improvement of navigation by the construction, away from the shore line, of works in a public navigable river or water, and if such right of access ceases alone for that reason to be of value, there is not, within the meaning of the Constitution, *a taking of private* property for public use, but only a consequential injury to a right which must be enjoyed, as was said in the *Yates* case, in due subjection to the rights of the public—an injury resulting incidentally from the exercise of a governmental power for the benefit of the general public, and from which no duty arises to make or secure compensation to the riparian owner. The riparian owner acquired the right of access to navigability subject to the contingency that such right might become valueless in consequence of the erection under competent authority of structures on the submerged lands in front of his property for the purpose of improving navigation."

[1] At page 164.

This statement of the law is a declaration that the riparian owner holds his right subject to the *jus publicum,* and no question of the ownership by the Crown or by the State of the foreshore was necessarily involved; Justices Shiras, Gray and Peckham, however, dissented, holding that if by the law of the State in which the land is situated, the right of access is one of the incidents of abutting land, such right is property, and cannot be taken away without compensation. The difference, therefore, between the members of the court appears to be, not as to the existence of the upland owner's property right of access, but whether the right of the government to have the navigation improved is altogether paramount, or whether it could only be exercised after condemnation of such right. Thus aside from the views expressed by the court in *Shively v. Bowlby* as to the English common law, and its having become a part of the law of Oregon by adoption, there is nothing in any of these decisions holding that the ancient royal *jus privatum* and doctrine of purpresture became part of the common law usually prevailing in the United States.

We are now brought to consider the New York law and the antecedents of the *Brookhaven* case. They are referred to in great detail in that case and it would be wearisome iteration to treat them here at length. Suffice it to say that in the year 1892, the

case of *Gould v. Hudson River Railroad Co.*,[1] holding a riparian owner without remedy against a railroad corporation which cut off his access to the water, was reversed, and the right of access upon the part of an upland owner held to be a property right as against a private corporation whose erection of a railroad took it away or interfered with its enjoyment. Throughout *Rumsey v. R. R. Co.*[2] and later cases the statement appears in almost similar language to that used in the *Yates* case, to the effect that the right of access of the riparian owner includes the right to make a landing, wharf, or pier for his own use. That precise question, however, was not necessarily involved in any of the cases. It appears clearly, nevertheless that the right of access was a property right, although it was held in the case of *Sage v. The Mayor*,[3] that such right must be held in subordination to the right of the municipality to improve the navigation of the river. This is in line with the decision of the Supreme Court of the United States in *Scranton v. Wheeler*.

It was decided, upon the other hand, in the *Matter of the City of New York*,[4] that the erection of the Speedway along the Harlem River, by which

[1] (1852) 6 N. Y. 522.
[2] (1892) 133 N. Y. 79.
[3] (1897) 154 N. Y. 61.
[4] (1901) 168 N. Y. 134.

abutting owners were cut off from access to the river, constituted a taking of property for which the city was liable, thus emphasizing the fact that the riparian owner had a property right in the foreshore, subject only to the *jus publicum;* as otherwise, the city could have used it as it wished. The *jus privatum* was thus not recognized as law. This result seemed fairly deducible from the other decisions, as no amount of legal ingenuity could torture the erection of that delightful pleasure-ground into an improvement of navigation.

None of these recent cases, however, really considered the distinction between the *jus privatum* and the *jus publicum.* In the *People v. Vanderbilt,* the Court of Appeals, possibly unnecessarily, but nevertheless somewhat positively, committed itself to the purpresture doctrine. The defendant had constructed a solid pier filled with stone beyond the New York harbor line and an action was brought in behalf of the people to restrain the erection of such pier and to compel the removal of the part already built. It would seem from the report that the decision might well have been placed upon the ground that the pier was an obstruction to navigation and, as such, a nuisance. This is the view taken of the decision by the court in the *Brookhaven* case. The court, however, in the *Vanderbilt* case did not

ostensibly rest its decision upon such ground. They say: [1]

"The crib sank by the defendant and the proposed pier were a purpresture, and were, *per se,* a public nuisance. *The offer, therefore, of the defendant's counsel to prove by the testimony of witnesses that the crib and proposed pier were not, and would not be, an actual nuisance, and would not injuriously interfere with or affect the navigation of the river or bay, was properly overruled.*"

As an authority on this proposition is cited *Attorney-General v. Richards,* discussed above. I am not aware of any other cases in the higher courts in this State standing squarely for the royal prerogative doctrine.

The law stood in this situation when the case of *Trustees of Brookhaven v. Smith* [2] reached the Appellate Division in the Second Department. It appears that the town of Brookhaven was seized of certain lands under water under ancient royal grants dating back to 1666. Claiming a right to a fee ownership in the foreshore under these grants, the town leased such foreshore to persons other than the riparian owners. The riparian owners had built docks upon this leased land, and the town lessees consequently sued them in an action for trespass.

[1] 26 N. Y., at page 297.
[2] (1904) 98 App. Div. 212.

No questions of navigation, or of the rights of the general public, were involved. It was necessary to determine whether the town was the owner of the foreshore under such old grants, and if so, whether it consequently had a right to abate as a purpresture the dock in question. The Appellate Division assumed that the grant of the lands under water conveyed to the town title to high-water mark, and that the grants were to be interpreted in the light of the law at the time they were made. Under such law, so the court held, the king was the owner of the foreshore and any riparian owner who placed anything thereon was a mere trespasser.

"By the law of England," says the court,[1] "as it existed at that time, every building or wharf erected without license below high-water mark, where the soil belonged to the King, constituted a purpresture and might, at the suit of the King, be either demolished, or be seized and rented for his benefit, if it did not constitute a nuisance to navigation, * * * and no reason suggests itself, why the defendants should have a higher right against the grantees of the King than they would have had against the sovereign of Great Britain had he continued the owner of the soil."

Consequent upon this decision, efforts to enforce supposed town rights by summarily destroying the

[1] At page 217.

wharves of the abutting owners were made on Long Island. The writer was, among others, a victim of the ancient Stuart doctrine of purpresture and of the vicious but ancient legal theory of the *jus privatum* devised by Mr. Thomas Digges, sanctioned by the Ship Money judges, the final manifestations of which took the form of ludicrous antics on the part of petty town officers intoxicated by the recrudescent exuberance of royal prerogative. This zealous desire to conform to the latest utterances of the courts, and to vindicate the kingly dignities inherited from English monarchs vested by ancient grant in municipal corporations, added greatly to the interest in the result of the appeal to the Court of Appeals in the *Brookhaven* case.

Prior to that decision, however, the Appellate Division in the Second Department decided the case of *Coudert v. Underhill*.[1] In that case the ruling in the *Brookhaven* case was affirmed, and the statement in a then recent case in the Court of Appeals [2] to the effect that the right of access included the right to make a landing, wharf or pier, was distinguished on the ground that, *while this might be true where the foreshore was owned by the State, such was not the law in the case of a*

[1] (1905) 107 App. Div. 335.

[2] *Thousand Islands Steamboat Co. v. Visger* (1904) 179 N. Y. 206.

municipal corporation. The right to erect a dock, it was said,

"has no reference to a situation where the fee of the soil between high and low-water mark *is in an individual or corporation.*" [1]

As the fee of the soil, whether in the State or in the municipal corporation, must ultimately have been derived (if derived at all) from the English Crown, it is difficult to see upon what ground a distinction could be made, between the State as owner and a municipal corporation as its grantee. However, this point although discussed upon the argument, was not adverted to in the *Brookhaven* case and we may assume that the Court of Appeals found that even its novelty did not require any mention. It is interesting to note as a commentary on the possible ramifications of the ancient legal proposition, the suggestion by an appellate court that the ancient kingly *jus privatum,* while it might not pass to an American State, could pass in all its panoplied majesty to a mere municipal corporation. Such a doctrine was, of course, inconsistent with the decision of the Court of Appeals in *Coxe v. State,* [2] holding that the State inherited the foreshore in a purely governmental capacity and could not grant

[1] At page 336; the italics are the writer's.
[2] (1895) 144 N. Y. 396.

it out for speculative purposes—"a sovereign, not a proprietary right."

In the Court of Appeals the argument made on behalf of the town was that

(1) The ancient grant to the town of Brookhaven must be construed in the light of the law as it then stood. This law was to be found in *Attorney-General v. Philpot* and some of the other cases heretofore referred to.

(2) The rights of the town as so interpreted were vested rights and could not be disturbed without compensation.

The claim of the town, if its analysis of the situation was well-founded, led to a grave constitutional question. The Supreme Court of the United States has very recently held that a State court cannot by a change in its common law deprive persons of the enjoyment of something that had theretofore been considered property or a necessary incident thereto.[1] Had the Court of Appeals actually declared not to be a property right something which when the royal grants were made had been property, this change in the law might well have been claimed to impair the obligation of contract and to constitute a taking without due process.

It might, I believe, have been a sufficient answer

[1] *Muhlker v. Harlem Railroad Co.* (1905) 197 U. S. 544.

to the town's position to say that their view of the English law was not sound. Prior to the adoption of the English common law by the State [1] there was, as has been indicated, no valid or adequate precedent to the effect that a structure erected on the foreshore by a riparian owner in order to give him access to the navigable portion of the water, was, in and of itself, a trespass or encroachment on the King's soil. The whole doctrine of purpresture might well have been regarded as merely an ingenious theory of overzealous and unscrupulous Crown lawyers, which, at least in 1777, had not become a settled part of the common law.

The Court of Appeals, while not treating the question in exactly this fashion, reached a similar result, and quite as effectively relegated the *jus privatum* to the very proper category of legal antiquities.

In a most erudite and interesting opinion, Judge Gray held that assuming the English law to be as claimed, yet—

"The adoption by the people of this state of such parts of the common law, as were in force on the 20th day of April, 1777, does not compel us to incorporate into our system of jurisprudence principles which are inapplicable to our circumstances and which are inconsistent with our notions of what

[1] 1777.

a just consideration of those circumstances demands. * * * 'no doctrine is better settled than that such portions of the law of England, as are not adapted to our conditions, form no part of the law of this state.' " [1]

"The *jus privatum* of the crown, by which the English king was deemed to own the soil of the sea and of navigable rivers, in his own right, rather than as a sovereign holding it in trust for his people, however applicable to the conditions in Great Britain, were totally inapplicable to the situation of the colonists of this country. In Gould on Waters, the author remarks, as to this, that 'there is no evidence that the *jus privatum* * * * was ever asserted in the colony as the right of the Crown, or that it has, until recently, been claimed by the states; but there is, on the contrary, in my opinion, the strongest evidence that this right has been abandoned to the proprietors of the land from the first settlement of the province and exercised by them to the present day, so as to have become a common right and thus the common law." [2]

Here at last the *coup de grâce* has been given to the old doctrine. The elaborate structure invented by the keen but time-serving Digges, adopted by the Stuart kings, sanctioned by subservient judges and finally through the invincible English love of prece-

[1] *Town of Brookhaven v. Smith* (1907) 188 N. Y. 74, at 79.
[2] At page 80.

dent become part of the common law, has at length died in the year 1907 as the consequence of a lawsuit over a little dock on a Long Island shore.

The opinion further refers to the fact that riparian owners have everywhere made their right of access available by building piers or wharves "and have done so without interference by the State where superior public rights have not been obstructed."

"These interests must be very large and if we shall hold with the English common-law doctrine that they are purprestures or unlawful encroachments upon the proprietary rights of the state * * * it would result in causing a very grave loss."

The New York cases are fully reviewed and it is shown that succeeding cases had completely and admittedly overruled the case of *Gould v. Hudson River R. R. Co.,* and the right of access of the riparian owner and the fact that this right constituted property had been frequently and emphatically recognized and repeatedly said to include the right to build a wharf.

In answer to the suggestion that these expressions in the cases referred to, notably the *Rumsey* case and *Thousand Islands Steamboat Co. v. Visger,* were mere *dicta,* the court said:[1]

[1] At page 83.

"While it may be true that what was said, as to the measure, or substance of the riparian owner's right of access from his upland to the navigable body of water in front of it, was not essential to the decision of the precise issue, it was, nevertheless, the deliberate and careful expression of an opinion as to that right and one not altogether impertinent to the decision of the particular case. As establishing the rule of law in this state upon the extent of a riparian owner's right, the decision in the *Rumsey case* has been followed, and acted upon, by the Appellate Division of the Supreme Court, in at least three of the judicial departments."

The opinion summarizes the whole situation in the following concise expressions:[1]

"So I conclude that the question is not, what was the common-law doctrine concerning a riparian owner's right in the foreshore, or tideway; but what that right has been construed to mean by the courts of this state. The town of Brookhaven acquired its title under the royal grants; but it holds it in trust for the members of the community and, if we admit that the plaintiff, Post, as its lessee, took exclusive rights under its lease, they cannot avail to abrogate, or to destroy, a right which appertained to a riparian ownership, to make available the easement, or right of access, by the construction of a landing, pier or wharf.

"For these reasons, I advise that the judgment

[1] At page 87.

below be reversed and, as the controversy does not depend upon the facts, that the complaint be dismissed; with costs to the appellants in all the courts."

The old doctrine, however, died a hard death, for we find an elaborately erudite dissenting opinion written by Judge Hiscock and concurred in by Judges Vann and Werner. Judge Hiscock takes the view that at the time the grants were made, the King had, by English law, title to the foreshore and the grants were in the nature of contracts to be construed and interpreted in the light of the law, as it prevailed when they were made. Two classes of rights existed in the King, the *jus publicum* and the *jus privatum*. The latter

"was a property right and the title and right which he (the king) enjoyed in his capacity he could by virtue of his proprietary interest convey to a private individual, but always subject to the rights and privileges of the people at large comprehended within the definition *jus publicum*" [1] * * *.

"An unauthorized obstruction, injuring the *jus publicum* by impeding or in any manner interfering with the common right of the public to navigate and use the waters was and is a nuisance and to be abated as such. A purpresture relates, on the contrary, to the *jus privatum*. It was and is an invasion of the right of property in the soil while held

[1] At page 90.

by the king or the people. It might or might not also be a nuisance." [1]

"Thus we find that all of the expressions in these cases tending to support appellants' proposition are rather by way of illustration and amplification of what was essentially involved than otherwise, and moreover that directly or indirectly they are based upon the *Yates* case which, upon this point, can no longer be regarded as authoritative." [2]

The doctrine of the *Brookhaven* case has been reaffirmed and distinguished in the case of *Barnes v. Midland Railroad Terminal Co.*,[3] decided November 10, 1908. The owner of lands upon the Staten Island shore had constructed a pier connecting his uplands with the sea, but in addition, he had placed under the pier a fence or barrier apparently designed for the purpose of obstructing the passage along the shore. The question argued in the case was whether the riparian owner's rights in the foreshore were so exclusive as to enable him to erect a barrier which prevented the public walking along the beach. The court took the view that while under the *Brookhaven* case, the owner had a right to erect a pier which might incidentally be an obstruction to pedestrians on the foreshore, nevertheless, this right was limited to the necessities of the

[1] At page 91.
[2] At page 102.
[3] 85 N. E., 1093; 126 App. Div. 435; 193 N. Y. 378.

situation, and that in the case at bar, the barrier under the pier was unnecessary for the riparian owner's purposes of access and was an interference with the rights of the public to pass along the foreshore. This decision does not seem to in any way conflict with or encroach upon the doctrine of the court in the *Brookhaven* case. There are, however, some remarks which may be taken to indicate that the death struggles of the ancient *jus privatum* are not quite over. The court says: [1]

"The same reasons which underlie the decision in the *Brookhaven* case as to the rights of littoral and riparian owners apply with even greater force to the right of the public to use the foreshore upon the margin of our tide waters for fishing, bathing and boating, to all of which the right of passage may be said to be a necessary incident. *Except in so far as the jus privatum of the Crown has devolved upon littoral and riparian owners*, that right now resides in the people in their sovereign capacity. This is the logical result of our decision in the *Brookhaven* case, and it is in harmony with the development of our history and the spirit of our institutions."

I incline to believe that it is not some fragment of the discredited and dismembered *jus privatum* if that be the learned judge's meaning, that now

[1] *Per* Werner, J. (193 N. Y., 384).

resides in the right usually claimed to walk along the shore and to pass over the beach between high and low-water mark. It would seem if a right, at all, to be properly included in the *jus publicum* and appears somewhat analogous to the right of the public to pass in the boat over the foreshore when the tide permits it. In order to sustain this right, it is not necessary to invoke the shade of the dead prerogative doctrine, for as the opinion itself, in referring to the *Brookhaven* case, says:

"the *jus privatum* of the crown, by which the sovereign of England was deemed to be the absolute owner of the soil of the sea and of the navigable rivers, was totally inapplicable to the conditions of our colonies when the common law was adopted by them; and that this right, from the first settlement of our province, seems to have been abandoned to the proprietors of the upland so as to have become a common right, and thus the common law of the state."

As the referee found that the riparian owner had a grant of land from the State, which grant contained a condition that neither he nor his successors should erect any obstruction of any kind in or upon the land lying between the lines of high and low-water mark as they now exist, the case might easily have been made to turn upon the terms of the

grant. The court, however, seemed to be clearly of the opinion that the terms of the grant did not affect the riparian rights, but that the right to build a wharf does not include the right to obstruct the public passage unless such exclusion be necessitated by the nature of the wharf itself. It remains to be seen whether a riparian owner would be allowed to build a solid pier which would necessarily prevent all movement along the shore. We can only say that in view of the *Brookhaven* case and the *Midland Railroad* case, this problem would probably be determined by reserving as a question of fact, the proposition as to whether that particular kind of a pier was suitable and necessary to the premises in question. The court indicates this pretty clearly in the following apposite language:

"It is enough to say that either as littoral owner or by virtue of its letters patent, the defendant had the right to construct and maintain a pier that was reasonably adapted to the purpose for which it was primarily intended and that was to provide a means of passage from the upland to the sea. To the extent that the reasonable exercise of this right necessarily interfered with the right of the public to pass along the foreshore the former was paramount and the latter was subordinate; and the logical corollary to that proposition is that, just in so far as the attempted exercise of the littoral or riparian right passed the prescribed bounds of necessity and rea-

son, the conditions were reversed and the right of passage along the foreshore remained the paramount right."

The court did not advert to *Blundell v. Catteral,*[1] in which it was held that the public had no right to bathe or walk along the beach.

This (*Barnes*) case is also interesting from another standpoint; the question as to whether a riparian owner by reason of a grant of the foreshore from the State would have superior rights to one who did not have such a grant, has been a mooted subject for years. The opinion apparently assumes that the riparian owner's right would be the same in either event, as the State could not surrender any of its public rights by a transfer of the title to the soil. This seems a perfectly logical deduction from the *Brookhaven* case, which by recognizing the abolition of the *jus privatum* really prevents the State from transferring anything, since the naked title to the soil can give no part of the *jus publicum,* which is all that the State has, and which it possesses regardless of the question of the fee ownership in the foreshore. While this point may not be definitely determined by either of the cases in question, it would seem to be a corollary from the doctrine of both. Fee in the foreshore may thus become a purely academic question

[1] (1821) 5 B. & Ald. 268.

affecting neither the rights of the public nor the rights of the riparian owner.

It is frequently the proud boast of devotees of the English law, that "the common law *broadens* down from precedent to precedent"; on the other hand, the civilian is apt to tell us that the common law by its slavish adherence to the rule of *Stare Decisis* has rather a tendency to *narrow* down from precedent to precedent. Both beliefs probably express certain phases of the truth. The history of civil liberty aptly illustrates the correctness of the first view, at least in regard to one great department of human activity, while the law of real estate, still so full of archaic matter despite the efforts of legislation to rationalize, clarify and simplify its ancient and largely feudal structure, may well justify the other. Perhaps the tendency to a broadening development in matters affecting human liberty is explicable upon the theory that as law must ultimately reflect the dominant opinion of the time, the growth of English civil liberty was due rather to the pressure of enlightened public opinion from outside the bar, than to the efforts of the lawyer class itself; while, on the contrary, the law of real estate was developed wholly by lawyers for a small class of land owners and nearly always in hostility to any attempts at legislative change, until it became a game for experts whose intricacies

passed the common understanding, almost as much as does the Hegelian philosophy.

The mere doctrine of precedent may, if used by the courts in mechanical fashion, make law as unchangeable as that of the Medes and Persians. A precedent isolated from the atmosphere of contemporaneous history is necessarily unintelligible; it must be considered in the light of the circumstances and the social conditions under which it arose. Why should generations of judges have considered the *Philpot* case of more value in guiding the judicial footsteps than the "Great Remonstrance," which denounced the doctrine of that case as usurpation?

If class opinion tends to narrowness, is it not largely because the following of precedent is regarded as a virtue in and of itself, rather than as a means of reaching wise and just results by applying the collective and traditional wisdom of generations of judges to the solution of legal problems? Yet when this useful principle is applied mechanically and unhistorically, it may easily result in fastening upon our jurisprudence, doctrines which originated neither in collective nor in individual wisdom but were merely the result of class greed, judicial subserviency or passing public clamor, none of which causes can be trusted to create sound precedents. The point discussed in this chapter is

a mere incident in the broad domain of riparian rights, but it involves an interesting episode of legal history, for we can see the origin and watch the development of a legal doctrine until the day when we assist at its final obsequies. As a study in legal morphology its discussion seems "worth while."

IX

ALIENS AND THE PROGRESS OF THE LAW

THE subject is naturally one of rather narrow limitations. The general position of the alien is that of gradual emancipation from the disabilities imposed upon him as the result of prejudice, of ignorance or of that primitive psychology expressed by the English costermonger in the saying: "He's a stranger; 'eave 'alf a brick at him."

The substantive rights of the alien must be determined by the general law of the land, and yet these substantive rights can have no value unless there be correlative procedural rights, and would be a mere rhetorical flourish were aliens practically excluded from the legal tribunals.

There are few more interesting episodes in history than that of the creation about the year 300 B. C. in Rome of a special Prætor (Peregrinus) to hear the causes of foreigners. Aliens in primitive communities, as so delightfully and cogently explained by Mr. Fustel de Coulanges, could have no rights in the community, for all rights were predicated upon a common religion, based upon the wor-

ship of common ancestors and of the local divinity. But, yet, even in the time of Pericles and of Aristotle these ancient views as to aliens had well-nigh disappeared and the liberal Athenian democracy had placed them in almost the same position that they now occupy in modern civilized states, for we find Aristotle saying:

"Leave out of consideration those who have been made citizens or who have obtained the name of citizen in any other accidental manner. We may say, first, that a citizen is not a citizen because he lives in a certain place, for resident aliens and slaves share in the place; nor is he a citizen who has no legal right except that of suing and being sued; for this right may be enjoyed under the provision of a treaty. *Even resident aliens in many places possess such rights,* although in an imperfect form; for they are obliged to have a patron." [1]

Considering the position of the alien in modern law courts, we naturally begin with England. The disabilities of aliens in England have been practically removed and they have complete and free access to the law courts, but it was probably not without a long struggle that the alien in England was finally admitted into the courts upon an equality with subjects. In the Middle Ages their rights

[1] Politics of Aristotle, Jowett's Translation, Vol. 1, p. 67; Bk. III, I, 4.

were very uncertain and seem to have been gradually acquired by the foreign merchants as merchants, rather than as aliens. The merchants were evidently useful to the kings and the kings protected them to some extent, for Littleton says of aliens who have come into England under the safe conduct of the king:

"They are not bound to sue according to the law of the land, nor to abide the trial by twelve men and other solemnities of the law of the land, but shall sue in the Chancery and the matter shall be determined by the law of nature." [1]

This statement that their rights shall be those accorded by the law of nature has a peculiar resemblance to the French doctrine that the alien possesses those rights only which belong to the *jus gentium* but not those which belong to the *jus civile*. Their rights, however, were more in the nature of peculiar and occasional privileges granted by the king's courts and they do not seem to be recognized by the law of the land. Pollock and Maitland say that the common belief as to them was that they were all usurers and therefore living in mortal sin. Henry III banished the so-called Caursini (an Italian guild) but they only lay hid for

[1] Pollock and Maitland's History of the English Law, 1st ed., p. 449.

a time, the king conniving at their presence and a little afterwards they are found acquiring splendid palaces in London and no one dared attack them for they called themselves the Pope's merchants.

With the growth, however, of the so-called commercial law, the distinction between aliens and subjects gradually breaks down. This law is not looked upon as part of the common law but as a certain general international law common to all mercantile transactions.

The probable origin of the right of the state to take the property of aliens is admirably described by Pollock and Maitland, as follows:

"The truth seems to be that in the course of the thirteenth century our Kings acquired a habit of seizing the lands of Normans and other Frenchmen. The Normans are traitors, the Frenchmen are enemies. All this will be otherwise if a permanent peace is ever established. But that permanent peace never comes, and it is always difficult to obtain a restoration of lands which the King has seized. France is the one foreign country that has to be considered in this context; Germans and Italians come here as merchants, but they have no ancestral claims to urge and do not want English lands, while as to Scotland, owing to the English King's claim to an overlordship, or to some other reason, Balliols and Bruces hold land on both sides of the border until a long war breaks out between the two countries.

To us it seems that the King's claim to seize the lands of aliens is an exaggerated generalization of his claim to seize the lands of his French enemies. Such an exaggerated generalization of a royal right will not seem strange to those who have studied the growth of the King's prerogatives." [1]

This is an amusing illustration of the absurdity of trying to find philosophic justification for legal anomalies whose only explanation is historic; they are merely rudimentary survivals like the vermiform appendix in man and the clavicle in the cat.

The English law makes no distinction of alienage in the courts, but, like the American States, has long required security for costs from non-residents, this distinction applying alike to aliens and subjects.

(a) In the United States the rights of aliens to sue in the federal courts is guaranteed by the Constitution, the third article of which extends the judicial power to

"all cases, in law and equity, arising under this constitution, the Laws of the United States, and treaties made, or which shall be made, under their authority; * * * to controversies between two or more states, between a state and citizens of another state, between citizens of different states * * * and between a state, or the citizens thereof and *foreign* states, citizens, or subjects."

[1] Pages 445-46.

The alien is thus in a peculiarly favored position, and, indeed, the result of this constitutional provision is to frequently place him in a more advantageous position than the citizen; for the citizen, indeed, cannot sue in the federal court unless the defendent is a non-resident of the State, while the alien may sue the citizen of any State in the proper federal court, although they both reside in the same jurisdiction.

Questions, of course, arise as to what constitutes alienage and the proper district in which actions should arise. These questions, however, are not incident to the rights of aliens *qua* aliens and their discussion here would be out of place.

There is, besides this constitutional right and the general statutory provisions carrying it out, a very peculiar provision of our federal Judiciary Law which has been in our statutes since the enactment of the original Judiciary Act and which has been invoked, as far as I am able to discover, upon one occasion only. This provision is now found in the new federal Judicial Code (Chapter Two, Par. Seventeenth) conferring jurisdiction upon the district courts:

"Of all suits brought by any alien for a tort only, in violation of the laws of nations or of a treaty of the United States."

I have searched in vain for the origin of this peculiar enactment, but Congress seems to have been guided by great solicitude for aliens and a desire to give them the fullest and freest access to the courts of the nation. This paragraph was recently brought in question in the case of *O'Reilly v. Brooke,* which was twice before the District Court and was finally decided by the Supreme Court of the United States. [1]

In this suit the plaintiff sued General Brooke, who had been Governor-General of Cuba during the American intervention, on the ground that he had, contrary to the law of nations and to the eighth article of the Treaty of Paris, dispossessed her of property of which she had been lawfully possessed and which had been a hereditament in her family since the early part of the eighteenth century. This property consisted in the right to conduct exclusively the slaughter of cattle for food in the city of Havana.

In the District Court, when the case came up upon a demurrer, no serious objection was made by counsel for General Brooke, the Assistant Attorney-General of the United States, to the jurisdiction of the District Court, and the matter was, therefore, scarcely discussed. It was assumed that as the plaintiff was an alien and as the alleged wrongs

[1] 135 Fed. Rep. 384; 142 Fed. Rep. 855; 209 U. S. 45.

were predicated upon a violation of international law and treaty there could be no question of the jurisdiction of that court.

The court held on the trial that the plaintiff had a cause of action against General Brooke but that by reason of the ratification of Brooke's act by the executive and by Act of Congress (the Platt Amendment so-called) the plaintiff's remedy was against the United States.

The Supreme Court of the United States terminated the controversy by deciding that "the plaintiff had not possessed property within the meaning of the treaty but that it was an office which terminated with the Spanish sovereignty." The only reference made, however, to the section of the Judiciary Act in question is the following:

"If the plaintiff lost her rights once for all by General Brooke's order, and so was disseised, it would be a question to be considered whether a disseisin was a tort within the meaning of Rev. Stat., Section 563 (16). In any event the question hardly can be avoided whether the supposed tort is 'a tort only, in violation of the law of nations' or of the Treaty with Spain. In this court the plaintiff seems to place more reliance upon the suggestion that her rights were of so fundamental a nature that they could not be displaced, even if Congress and the executive should unite in the effort. It is not necessary to say more about the contention than that it

is not the ground on which the jurisdiction of the District Court was invoked." [1]

We have thus no further light upon this very peculiar statute. It is to be hoped that the courts will have further opportunity to construe it, as it seems to have been sadly overlooked by members of the bar and might be made use of to maintain and develop the rights of aliens under international law. The statute is in any event fraught with potentiality and its development will be watched with interest.

There is another peculiar situation arising with regard to the federal courts. We have seen that they might be resorted to by American citizens and by aliens. There exists, however, a very large class of persons under our flag who, not fitting into either of these categories, may not have their day in the federal courts.

It is, in any event, apparent that the peoples of our unincorporated territories are in a very anomalous position, as we have seen in a former chapter, and that as far as their right of access to our courts is concerned, they have not the rights and privileges of aliens. As long as very few of them come into the States of the United States the question may be largely academic, but if they should begin at any time to migrate on a large scale from

[1] 209 U. S. 45, at p. 51.

their own homes to other portions of our dominion, the question must necessarily become acute and call for definite settlement of their status by Congress.

(b) The position of aliens in the State courts is, of course, determined by the procedural law in each jurisdiction. Generally speaking, we may say that there is no discrimination against aliens as aliens. The State laws generally provide that in suits brought by non-residents against a resident there shall be security for costs. The New York forum may be taken as a normal one and the Code of Civil Procedure prescribes the formalities for the giving of such security. These provisions apply not only to non-residents of the State, but in certain cases to non-residents of the county. The security is given to cover the costs solely and not the amount of money judgment which may be recovered. The usual bond required does not exceed $250.

It will be noted here, however, that the requirement is based not upon allegiance but upon mere non-residence, and that a Frenchman, an Englishman or a resident of Massachusetts is placed upon the same footing.

These statutes, therefore, do not enter into the category of legislation dealing with or affecting the status of aliens as such. Disabilities of aliens in this respect are due not to their allegiance but

to the accident, where it exists, of their non-residence. Resident aliens have practically the same right to sue as State citizens. Non-resident aliens are under some disabilities as regards acting as executors or administrators.[1]

The question of allegiance in Continental Europe is of more complexity than in England or America. We will take the French system as fairly typical. Variations from that system will be mentioned more or less incidentally. The situation of aliens in France as regards their private rights is regulated by the eleventh article of the Civil Code, which prescribes:

"Art. 11. An alien shall enjoy in France the same civil rights as those granted to French people by the treaties of the nation to which such alien belongs."

Few articles of any code have given rise to more discussion both among writers and in the courts. It would appear certain, however, that this article establishes not legislative reciprocity but diplomatic reciprocity. Thus strictly speaking, the alien in France enjoys only those civil rights accorded to him by treaty and not those which his national law might accord to Frenchmen in the alien's country. It has been held that the alien

[1] New York Code Civil Procedure, Secs. 2612 and 2661.

would enjoy these rights even when the treaty which accorded them to Frenchmen contains no reciprocal stipulation that they should be accorded to such aliens in France.[1]

This reciprocity is one that belongs to the nation as a nation, not to the individual as such. The individual can only ask for the same rights as would be accorded to a Frenchman in similar condition, and he could in no event require a wider range of rights than those accorded to Frenchmen themselves.[2]

Most of the treaties deal with particular subjects, commercial relations, copyright, trade-mark, patents, etc. There are few conventions which bestow enjoyment of all private rights upon foreigners.[3]

The question of deciding what rights a foreigner has in the absence of treaty has given rise to much difficulty and a great amount of discussion and litigation. The general principle seems to be that we must eliminate from the category of rights those

[1] Court of Cassation, Feb. 9, 1831; Sirey 1831, 1, 415; Aubrey & Rau, Tome 1, Par. 79, p. 310; Demolombe, Tome 1, No. 241, and Toullier, 4, No. 102; Baudry-Lacantinerie Houques Fourcade, Tome 1, 632.

[2] Court of Cassation, Aug. 10, 1813. Sirey, "Recueil," 1813; Aubry & Rau, Tome 1, p. 79; Weiss, Treatise, p. 124.

[3] Franco-Servian Treaty, Jan. 18, 1883. Convention Consulaire Franco-Espagnole, Jan. 7, 1862; Franco-Brazilian Treaty, clause of the most favored nation in civil law.

peculiar and positive dispositions of the civil law, such as the capacity to transmit and to inherit *ab intestat* [1] the right to acquire mining concessions, to become stockholders of the bank of France, protection of literary rights, patents, copyrights, etc., but there are still heated controversies regarding other private rights which do not belong peculiarly to the civil law.

There are four systems advocated by well-known writers and jurists. However, the system which seems to have the most numerous and notable adherents is that which is found set forth in the authoritative work on the Civil Law of Aubry and Rau (Merlin, Duranton, Proudhon, Richelot, Toullier). In this system the expression "Droit Civil" includes not all private rights but only those which are derived from the positive law or *jus civile.* These rights the stranger cannot enjoy in the absence of a treaty unless he has been authorized to fix his domicile in France. In regard, however, to the rights which are derived from the *jus gentium,* Article 11 of the Code does not apply and the alien may always exercise them.[2]

While this distinction may be theoretically possible, it is in practice very difficult of application.

[1] Arts. 726 and 912 of the Civil Code. Law of July 14, 1819.

[2] Court of Cassation, June 7, 1826. "Recueil" of Sirey, 1826. July 11, 1848; "Recueil" of Dalloz, 1848, 1, 140, May 20, 1862; Sirey, 1862, 1, 673, Feb. 16, 1875; Sirey, 1875, 1, 193.

What are the rights which fall within the domain of *jus civile* and what those which belong to the *jus gentium?*

Some writers propose as the test whether the right is generally admitted under all legal systems (Aubry and Rau); other writers find this criterion insufficient and think it necessary to analyze each case on its own merits. As a matter of fact, there is no absolute criterion; each question must be examined as it comes up. Some have been pretty well settled by current of decisions; others are still open. The tendency of the courts is to diminish the number of civil rights, pure and simple, which belong exclusively to Frenchmen and from whose enjoyment foreigners are excluded. The following rights are, however, generally considered to be civil rights:

1. The right of adoption or of being adopted; the right of prescription; the right to invoke jurisdiction of a French court in a case to which no Frenchman is a party; the right of *jouissance legale* of father and mother. 2. The right of *hypotheque legale.*

The question of the right to guardianship has been in some doubt but has finally been held to belong generally to the natural law (Tribunal of the Seine, 2 May, 1900). There are, however, decisions the other way.

Early decisions deny to an alien the right of domicile in France unless he had complied with Articles 13 and 102 of the Code Civil, which prescribe as follows:

"13. (Amended by Law of 26th June, 1889.) An alien who has been authorized by decree to establish his domicile in France shall have the enjoyment of all civil rights.

"The effect of the authorization shall cease at the expiration of five years if the alien does not ask to be naturalized or if his application is rejected. In case of decease before naturalization the authorization and the time of residence which has followed shall count for the wife and children who were minors at the time of the decree granting such authorization.

"102. The domicile of every Frenchman as to the enjoyment of his civil rights is at the place of his principal establishment."

This doctrine has been greatly tempered by the judicial recognition of a domicile in fact (*de facto*), to which are attached certain legal incidents. It seems reasonably accurate to say that the *permis de séjour* under Article 13 has now become a preliminary to naturalization and that a domicile *de facto* in France will give to the foreigner the rights usually springing from domicile among civilized nations with the exception above referred to re-

garding the possession of certain rights altogether peculiar to the civil law.

With these preliminary observations as to the substantive rights of aliens in France, I will take up the question of their standing before the courts. This question may be conveniently grouped under three heads:

(1) The provisions for security for legal expenses required of aliens as such (*judicatum solvi*);

(2) What particular local court has jurisdiction over suits between aliens or between aliens and Frenchmen, and

(3) The rights of aliens as against other aliens.

As a general principle, all aliens are required to furnish an indemnity before they can come into a French court to sue a Frenchman. Article 16 of the Code Civil provides as follows:

"16. (Amended by Law of 5th of March, 1895.) In all cases an alien who is the original plaintiff or interpleads shall be obliged to give security for the expenses and damages resulting from the suit, unless he owns real estate in France of sufficient value to secure the payment thereof."

and this article itself has been modified by the law of the 5th of March, 1895, which strikes from the code the exception relating to commercial cases, thus making the security applicable to cases in com-

mercial courts as well as elsewhere. This security is termed in the French law *"caution judicatum solvi."* The Latin expression is somewhat misleading, since the origin of this provision for security seems to go back to the later Roman law which exacted of every plaintiff, whether Roman citizen or foreigner, the *cautio pro expensis,* which related only to the expenses of the trial and did not guarantee the defendant for any judgment which he might obtain against the plaintiff. In France the *judicatum solvi* consists in a guaranty given by the plaintiff, the object of which is to furnish security, not for the execution of the judgment, as the Latin phrase would seem to indicate, but for the payment of the costs or expenses of litigation by the alien as well as any damages which may have been recovered by the defendant in the suit. Under the terms of Article 166 of the Code of Civil Procedure this indemnity is requisite, without exception, and must be provided for *in limine;* this security, however, not being considered matter of public policy (*disposition d'ordre publique*), the party to the litigation may consent to forego it and the French defendant who did not ask for it at the proper time would be considered as having renounced his right to it. On the other hand, it is considered as a matter purely of the civil law and is consequently not accorded

to an alien suing another alien in France, unless, of course, the alien plaintiff should possess an authorized domicile in France, under Article 13, in which case he necessarily enjoys all the civil rights of Frenchmen.

The only exceptions, in the absence of treaty rights, to the furnishing of this guaranty are:

(1) If the alien possess in France real estate of a value equal at least to the amount of any indemnity that might be fixed by the court;

(2) Persons authorized to fix their domicile in France (Article 13);

(3) Where there exists legislative reciprocity;

(4) Where there are treaties between France and other nations by which the nationals of the contracting parties are freed from this obligation. (Code Civil, Article 11.)

The giving of the security is carefully regulated by rules of procedure which it is not necessary to detail here. The question of amount is submitted by the defendant to the court, and after an opportunity for discussion by the parties to the litigation, the sum is fixed by judicial order.

In practice, indemnity is usually made by a deposit of money or of securities in one of the public depositories, usually *La Caisse Generale des Depôts et Consignations.* The order fixes the terms under which this deposit is to remain in the depository.

In case of an appeal by the foreign plaintiff, another provision for indemnity is necessary.

The two important exceptions to the rule, however, are the one relating to legislative reciprocity and that relating to diplomatic reciprocity. Jurists speak of legislative reciprocity as belonging to the domain of internal (or municipal) law, and diplomatic or treaty reciprocity as belonging to that of the external (or international) law.

For many years subsequent to the enactment of the code, the general opinion among jurists was unfavorable to the rule of exacting this security from aliens. The matter was, however, submitted to a committee (commission) of the Chamber of Deputies for a report as to the expediency of reforming the law in 1892, and the result was a report to the Chamber in which the committee cited the case of a naval constructor of Tréport who, having brought suit in England, was forced to furnish an indemnity of 2,500 francs. It was argued that such treatment on the part of the English should be met with reciprocity and the consequence was the law of the 5th of March, 1895, above referred to, which abolished the immunity from the *judicatum solvi* accorded by the code in cases in the tribunals of commerce.

This doctrine of legislative reciprocity which

the courts apply to the question of *judicatum solvi* is really nothing more than a revival of the old right of retorsion. While apparently fair at first view, it has the grave defect of naturally leaving the initiative to the other party and creating unfriendly feelings and thus interfering with that amiable and equable frame of mind which conduces to the adoption of reciprocity treaties.

It is, in my opinion, an unfortunate, not to say a retrograde and vicious doctrine.

Many nations have availed themselves of the diplomatic method to avoid the necessity of furnishing this indemnity. Some treaties expressly exempt nationals of the contracting parties from the giving of security as a condition precedent to bringing suit, while others content themselves with merely stating that the nationals of each party shall have free access to the tribunals, and again some countries have adopted in this respect the most-favored-nation clause.

We find in Continental Europe a good deal of diversity in regard to the furnishing of indemnity *judicatum solvi*. Some nations, among which we find Italy, Portugal, Denmark and a few smaller ones, have abolished it entirely. The Italian Civil Code of 1865, Article 8, provides that: "the alien is admitted to the enjoyment of the civil rights accorded to citizens." Italy in this respect, as in

many other matters relating to private law, is in the forefront of civilization.

Countries like Belgium and Luxemburg follow the French rule, as does Holland. Russia exacts indemnity *judicatum solvi* except in the case where the plaintiff is solvent. Switzerland, like England and the United States, does not discriminate between its citizens and aliens, but requires all non-residents to furnish security.

Germany bases its law entirely upon the system of legislative reciprocity. The German judge must ascertain the law regarding security prevailing in the country to which the plaintiff belongs. Austria, since 1898, has adopted the same system, as has been done by Spain and Hungary. All these countries, however, have also numerous treaties of exemption, and it is necessary in each case to ascertain whether the country of the forum does not have a treaty with the nation to which the plaintiff in the particular case belongs.

It is apparent that this question is, in Continental Europe at least, in a condition complicated, unsatisfactory and unsystematic, since intelligent and enlightened public opinion surely requires that an alien, merely because of his alienage, should not be subjected to the necessity for furnishing any guarantees not required of a national. The number of treaties to this effect indicates the feeling of

the nations. Two solutions of the difficulty are possible: (1) a general legislative abolition of this limitation on the right of foreigners to sue, or (2) if this be impracticable, a series of general treaties or a general Hague convention bringing about this result. Probably the latter is the more practical course and the one which will be eventually followed.

When a foreigner sues or is sued in France, the question at once arises as to where the venue of the suit should be laid. In case the foreigner has a domicile, even *de facto,* in France, the tribunal of his domicile will have jurisdiction. If the defendant is a corporation and possesses a branch office in France, the tribunal of the district in which this branch office is situated has jurisdiction. In the case of commercial tribunals, the question is regulated just as it would be between Frenchmen, the jurisdiction of the tribunal being based upon certain incidents relating to the origin or place of fulfillment of the obligation. (Article 420 of the Code of Civil Procedure.)

Article 14 of the French Code Civil provides that a foreigner

"even not residing in France, may be summoned before the French courts for the fulfillment of obligations contracted by him in France towards a French person. He may be called before the French courts

for obligations contracted by him in a foreign country towards French people."

and Article 15 of the Code declares on the other hand that:

"a Frenchman may be called before the French courts for obligations contracted by him in a foreign country, even towards an alien."

These provisions seem reciprocally fair, and the questions that arise as to the local tribunal having jurisdiction of the particular affair are matters of technical procedure, having little or no relation to the alienage of the parties, but ultimately governed either by domicile, place of business or some incident connected with the origin or fulfillment of the obligation in question.

A more difficult question arises as to suits between foreigners. The Civil Code contains no provision regulating the rights of foreigners to sue each other before the French tribunals. The original draft of the Code (1801) conferred upon aliens all civil rights. This was modified, and under the dominant influence of the First Consul, Article 11, above referred to, was enacted. There has thus been a good deal of discussion among the jurists and in the schools as to the rights of foreigners to sue each other, it being maintained on the one

hand that the French tribunals were for Frenchmen only and that foreigners had no standing. On the other hand, the more liberal minded and modern school of jurisconsults has always maintained that the French tribunals were under a social duty to render justice, not only to their nationals, but to every man on their territory who demanded it.

The tribunals have in fact followed a middle course, the general principle being that they are not compelled by positive law to take jurisdiction in litigations between foreigners.[1] Nevertheless, as they are not prohibited from entertaining jurisdiction in such matters by the code, they will do so where they think common justice or public policy require it and in every case where a foreigner has been admitted to domicile (Article 13) or where his rights have been guaranteed by treaties, in general commercial matters and in matters where provisional measures must be taken to preserve property or public health or morals. In effect, the exceptions to the general rule are so numerous that there remains nothing except questions of a purely personal nature arising between foreigners to which the old rule would seem applicable.

In matters concerning real estate, there can be

[1] Cour de Cassation of the 2nd of April, 1833. Sirey, 1833, I, 435.

no question of the jurisdiction of the tribunals, which is there not dependent upon the citizenship or alienage of the parties, but upon the *situs* of the property. (Article 3, Code Civil.)

In personal actions, the tribunals exercise a very large measure of discretion, for instance, divorces between foreigners are frequently granted where it appears that there is no other jurisdiction which can properly grant them. This is largely predicated upon the growth of the doctrine of domicile *de facto,* the adoption of which tends to give persons actually domiciled, although without permit, most civil rights. In divorce or separation cases, the party alleging lack of jurisdiction must prove that some other court would have jurisdiction over the question, otherwise the plea will be overruled.[1]

In commercial cases, jurisdiction is a question of right, and is not facultative. The alien cannot raise the question, nor can the judge refuse to take jurisdiction. This seems to be based upon the doctrine admitted in the discussions leading to the

[1] Court of Appeals of Dijon, April 7, 1887; Paris Court of Appeal, Nov. 4, 1890; Journal de Droit International Privé of Clunet, 1890, p. 483; Tribunal Civil of the Seine, 1893; Journal de Droit International Privé of Clunet, 1893, p. 160; Lyons Court of Appeals, March 10, 1894; Sirey, 1895, 2, 298; Paris, Jan. 14, 1896, Journal de Droit International Privé, Clunet, 1896, p. 149.

drafting of the Code Civil that in commercial matters the Civil Code did not modify the existing law. The mercantile or commercial law administered by the special commercial tribunals is held to deal with a class of cases arising from business relations and outside of general civil law. Thus questions of alienage or of citizenship are necessarily excluded from such tribunals.

Public policy further requires that a great number of provisional remedies shall be accorded, such as those for the safety of minors and incompetents, or of properties situated in France belonging to foreign decedents, etc. The rules upon this subject not being found in the Code Civil must be sought for in the decisions of the courts and it is, therefore, difficult to systematize them. The general tendency is, however, in these matters to assimilate the alien to the citizen, and the cases in which they are excluded from the tribunals, simply by reason of the fact that the litigation involves the rights of aliens, are exceptional.

The English and American law in opening the national tribunals to native and alien alike are in full accord with the best public opinion of our time which conceives that the alien should have equal rights with the citizen or subject, to appeal to the national courts. In many countries of

Europe certain disabilities exist rather because of associating alienage with mere non-residence, than because of existing prejudice against aliens. This seems as illogical as unnecessary and must in time disappear.

X

PROGRESS OF INTERNATIONAL LAW IN TREATMENT OF POLITICAL CRIME

CERTAIN subjects seem to recur for discussion periodically. Long intervals of quiescence, during which they provoke little or no discussion, are broken by some series of events which bring the dormant and only half-solved question again before a public, who, misconceiving all the difficulties, can not understand why lawyers and the law do not reach solutions of the problem with mathematical precision. Certain enthusiastic patriots, during the French Revolution, thought with Jack Cade that the simplest way to resolve the intricacies of the law was to hang the lawyers, and thus allow men to live together in brotherly love under the guidance of a few general principles, which, in the absence of the legal profession, no sane citizen either could, or would, misinterpret or cavil over. Simple the proposed solution certainly was, but its efficacy may be doubted, since the abolition of the bar which was actually decreed, was not followed by any halcyon time of concord. Only

for a time could street fights take the place of forensic disputation, and the speedy restoration of the *"ordre des avocats"* leads to the conclusion that the alternative system was not very successful.

In the domain of much mooted and periodically recurring legal controversies, the question of whether extradition should be granted for political offense, occupies a prominent place.

To the man in the street, the answer may seem easy; was not Washington a rebel once, General Lee an insurgent, and the great Kossuth a hero whose misfortunes entitled him to national sympathy, and hence should not the political refugee be accorded a ready and welcome asylum in this hospitable land? Yet even the man in the street may be made to look more leniently upon the lawyer's great weapon, the "distinction" when reminded that in the class of political offenders may also be placed objects of universal execration like Wilkes-Booth, Guiteau, Czolgolz, Fieschi, Orsini, the assassins of Carnot and of the late kings of Italy and Portugal as well as the men of the Paris Commune, whose monstrosities shocked the civilized world.

The man in the street would recoil in horror should you ask him to class as equally entitled to asylum on American soil men like Lafayette or Carl Schurz and the Communists of 1870 who cruelly

tortured and killed General Breda, an honorable and distinguished officer, when, desiring to save useless bloodshed, he presented himself with a white flag as a messenger of peace. The spontaneous differentiation which the universal instinct of every civilized community would make between such cases, may not as yet correspond to any legal distinction, nor may it have been specifically formulated, but can international law long fail to recognize a sentiment at once so obvious and commanding such general acquiescence?

We have seen our government quite recently refuse to extradite a man charged with the killing of three women. The American people are a chivalrous nation, and women killers, it is safe to say, will never be regarded by them with sincere admiration. The fact that the man in question, so the public prints report, has been found a vagrant in the Chicago streets, rather than been made the victim of public banquets, sufficiently disposes of the question as to the popularity of that kind of a hero among the American people.

The query is: can some formula be found by which international law, keeping in touch with the moral requirements of the age, may differentiate between those who have sought refuge here, after having honestly and fairly—although by revolutionary methods—sought to change, or modify, a

governmental system, and those who, although their acts may have been inspired by political motives, have yet been guilty of offenses generally reprobated by all civilized nations? The answer to this query will involve some examination into the nature of political crime and the present treaty law on the subject.

Evolution, legal as well as biological, sometimes appears to play queer antics. Political offenses, now generally excepted from the operation of extradition treaties originally were the sole offenses for which extradition was sought or granted. Without going back to the proclamation of the Athenians promising to deliver up those seeking refuge on their territory who had attempted to murder Philip of Macedon, we find a very early, if not the earliest, treaty of extradition concluded in 1147, between Henry II of England and King William of Scotland, providing for the surrender of traitors and felons. In 1303 a like clause is found in a treaty between France and England. Again, we find Henry VII obtaining from Spain the rendition of the Duke of Suffolk, afterwards executed by Henry VIII, and Denmark surrendering some of the men who had put Charles I to judgment and execution.

In 1790 Spain delivered to France, Ogé, charged with insurrection in San Domingo.

As late as 1801 the Senate of the Free City of

Hamburg surrendered to the English three Irishmen charged with sedition. Upon the latter occasion, Napoléon wrote to the Senate a letter reproaching them with having violated the laws of hospitality in a fashion which would have made the Nomad tribes of the desert blush. How far this outburst was due to love of liberty, sympathy with Ireland's woes, or merely dislike of perfidious Albion, on the part of the great man, is a question beyond the limits assigned to this chapter.

The obvious reasons for extradition in cases of political offense would appear to have been the importance attached to political crime compared with ordinary crime, especially in a society which was not policed as ours is, as well as the absence of the diplomatic and judicial machinery making extradition an easy and normal proceeding.

Underlying these reasons, however, there was, I suspect, a deeper one. The political theories of the Middle Ages seem to have had little place for the right of revolution, and the generally accepted imperial theory of power from above down, left small room for sympathy with insurrection.

This, perhaps, explains why political offenses were looked upon as the most serious of all, and we find Grotius saying: *statum publicum tangent aut eximiam habent facinoris atrocitatem.*

In the first quarter of the nineteenth century, we

find treaties expressly providing for the surrender of those who had been engaged in treason or other acts against the state. This was so, notably in the treaty between Austria, Persia and Russia, in 1834.

Political conditions in Europe had, however, so altered that the change in public sentiment was bound to be translated into the domain of diplomacy and law.

France was the first country to embody in law and in treaties the principle of exemption for political offense. The revolutionary origin of the July monarchy, together with the well-settled principle of popular sovereignty, as opposed to monarchic right, explains its resolution to neither grant nor request extradition where political acts were concerned, and led it to conclude various extradition conventions containing this exception. The principle was strongly stated and acted upon by Lord Palmerston in sustaining Turkey's refusal to surrender to Austria the Hungarian refugees of 1849. Since that time extradition treaties generally have contained the political exemption, and the general principle of extradition for common law crimes alone is now widely admitted.

The reason for the modern rule is not far to seek. Consequent upon the French Revolution and the growth of the idea of popular government,

honest attempts to subvert existing régimes were no longer looked upon as morally reprehensible; in some cases, indeed, such attempts were regarded rather with favor.

Among European nations there is now a fairly general consensus as to what constitutes common law crime. Murder, arson, robbery, embezzlement, and even theft are recognized as crimes by all legal systems. The category of crime is widening, and crimes of fraud are being constantly added to the list, which, at first, contained little more than crimes of violence.

As to political offenses, there can be no common consensus of right and wrong among nations whose governments are founded on no common political principles. Were such a principle recognized, it is quite probable that political acts would be generally extraditable, since an attempt to overthrow the organization of a whole society may be, and generally is, fraught with infinitely more serious consequences than the commission of an offense against any one individual.

Thus a clause permitting extradition for treason, among nations having governments based upon identical principles of popular sovereignty, would be logical and feasible. In fact, such is the case in the United States, in which the Constitution, following in that respect a similar clause in the

Articles of Confederation, provides for the rendition by a State of a person charged in any State with treason, felony or other crime, etc.

As, however, in the present condition of the political world, such a situation does not exist, we are brought to the really difficult question: what is political crime? The term is nowhere defined in the treaties; whether because it was thought too plain by some to require definition, I do not know. Learned jurists, diplomats, and courts have struggled with it, without hitting upon any yet accepted definition of the term. The general practice of nations has, however, shed some light upon the subject, and the really difficult question can, I think, now be segregated and treated alone.

Acts may be purely political acts, attacks upon the government through the press, seditious speeches or proclamations, etc., and they may be punished as crimes, but as extradition treaties generally make no provision for these, they need not here be discussed.

The real difficulty arises from mixed crimes, i. e., those which, such as murder or arson, are punishable at common law, but which were committed from a political motive rather than for mere gain or revenge. Murder and robbery, even when committed under the cloak of insurrection may well be treated

as common crime; we learn on the highest authority in the case of a certain Barabbas,

"And there was one named Barabbas, which lay bound with them that had made insurrection with him, *who had committed murder in the insurrection.*"—*Mark, ch. 15, v. 7.*

Ordinarily, the extradition treaties would apply to these offenses, and it is necessary for the prisoner charged with them to prove that the acts were political. Practically there are two categories of acts otherwise common law crimes, which might, by reason of their political purpose or object, be claimed to be political offenses:

(a) Isolated acts of violence not done as part of a general uprising, insurrection or political disturbance;

(b) Acts done in the course of and intended to further a political revolt or insurrection.

The desire to further a political end is the only element differentiating the first category from ordinary crime. I shall spend no time on that class of cases. While it was long disputed as to how far the assassination of a ruler could be classed as a political offense, international usage, growing sense of humanity, horror at the acts of such men

as the Phœnix Park murderers, or a Booth or Czolgolz, have caused governments generally to treat such miscreants as guilty of atrocious crime alike repugnant to all members of the family of nations.

It is common now to make an exception in treaties, exempting from the category of political offense, assassination of rulers. This, it may be suggested, leads to the inference that other political personages might be assassinated, and their assassins treated as merely political offenders; suffice it to say, that a different view has been generally taken and the murderer of a minister or magistrate is surrendered as any other murderer. This was the case recently in Switzerland when a magistrate was killed and the murderer was returned to Russia. Such a result is surely sound. If an officer may be killed with impunity by any one who does not approve of the government, why not equally exempt the individual who robs the government to procure funds for the maintenance of a political party? If political murder, why not political theft? Indeed, a man who had forged a will to get a succession, fled to Switzerland and when his extradition was demanded by Russia (1873), claimed that he had stolen the money to give it to a revolutionary society; but Swiss sense of humor was aroused, and his defense was held insufficient.

I think it may be fairly said without further discussion of this point, that the consensus of opinion to-day among the nations is to treat as a murderer any person who kills another with no other justification than that the latter held an office. The lot of the officeholder is not now so superlatively happy that equal justice should require his slayer to take rank in the gallery of great patriots.

It is generally admitted that anarchistic crime does not fall within the category of political crime. All nations recognize the absolute necessity for some kind of government. Persons whose mental and moral deficiencies lead them to commit acts of violence with the motive of destroying organized society, in the name of a Utopian dream, and of reducing civilization to the condition of the primeval horde, obtain no sympathy from the nations. An able writer has tersely characterized this type as:

"A man who commits murder and thefts is a man who has not the endowment of feelings which constitute the foundation of moral sense and who is, therefore, an abnormal man. Thus, whenever, an offense is perpetrated which presupposes, like murder, and theft, the absence of the minimum of pity and probity required for the normality of the moral type of man, the denomination "political crime" becomes misleading. There we have crime pure and simple."—Tosti, Anarchistic Crime, *Political Science Quarterly, Sept., 1899.*

This view in less scientific garb is found in the English and American decisions.

In 1894, one Meunier attempted to blow up some barracks in Paris and when arrested in England, in an extradition proceeding, pleaded among other things, that the offense charged was of a political character. To this the court said:

"It appears to me that in order to constitute an offense of a political character, there must be two or more parties in the state, each seeking to impose the Government of their own choice on the other, and that if the offense is committed by one side or the other in pursuance of that object, it is a political offense, otherwise not; * * * the part of anarchy is the enemy of all governments."—In re Meunier, 2 Q. B. D. 1894.

Our own Supreme Court has taken substantially the same view. The anarchist propagandist Turner was held to be properly and constitutionally excluded under the immigration law, not because of the commission of any acts of violence, but because his views were dangerous as incentives to violence. The Chief Justice admirably summarized the necessary limitations upon freedom of speech:

"We are not to be understood as depreciating the vital importance of freedom of speech, and of the press or as suggesting limitations on the spirit of liberty, in itself unconquerable, but this case does

not involve those considerations. The flaming brand which guards the realm where no human government is needed still bars the entrance and as long as human governments endure they can not be denied the power of self-preservation, as that question is presented here."—*Williams v. Turner,* 194 U. S., p. 279.

The Institut de Droit International (1892) admirably stated the principle applicable to anarchistic crime:

"Crimes directed to uproot the fundamental social institutions, irrespective of national divisions or of any given political constitution, or form of government, are *not* to be considered as political crimes."

The bearing of this upon the programmes of certain political associations whose aim seems to be a general suppression of the economic basis of all present societies is not far to seek.

There remains, however, the really difficult question of an offense committed in the course of some uprising or insurrection. Of this class of cases there is yet no treaty or statutory definition. I can find only one case in which the question was adequately or fully discussed and a definition attempted. In 1901 the British government was asked by Switzerland to surrender one Castioni.

It appears that a number of citizens in one of the Swiss cantons, feeling some dissatisfaction with the government, rather than resort to the ballot box for redress, seized an arsenal, provided themselves with arms, attacked the municipal palace, disarmed the police, imprisoned some members of the government, and established a provisional government of their own. During the course of the attack, the prisoner, who had taken part in the movement throughout, shot with a revolver and killed an officer of the government. He was arrested in England, committed for extradition on the charge of murder and sued out a *habeas corpus*. His defense was political crime. The court of Queen's Bench, apparently for the first time in England, somewhat elaborately considered the question and adopted the definition found in Sir James Stephen's History of the Criminal Law (Castioni, 1 Q. B. D. 149, 1891), as the clearest definition of the term "political offense." The language of Mr. Justice Stephen, who also was a member of the court at the time, is as follows:

"I think, therefore, that the expression in the extradition act ought (unless some better interpretation of it can be suggested) to be interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes if those crimes were incidental to and formed a part of political disturbances."

Such a disturbance was found to have existed and the prisoner's act to have been one of its logical incidents; hence he was discharged from custody.

The court also discusses a suggested definition by Mr. John Stuart Mill, the economist and philosopher, which he had formulated while a member of the House of Commons:

"Any offense committed in the course of or furthering of civil war, insurrection, or political commotion."

The judges, however, thought the definition of Mill too broad, as offenses might well be committed in the course of a revolution and yet be so separable from the objects of that revolution, as to be properly treated as mere common law offenses. By striking out the words "in the course of," the definition of the great economist becomes at least as good as that of the eminent judge and writer.

Accepting the court's definition as embodying the general view entertained on the subject as to what constitutes political crime, we find that two conditions must concur to bring the act, otherwise criminal, within the exemption. These conditions are:

(a) the existence of political revolt or disturbance;

(b) the fact that the act in question was incident to and formed a part of such disturbance.

These two questions are of an entirely distinct character.

The latter is one purely justiciable in its nature: was the prisoner affiliated with any organization, did he act under orders, and similar questions, are matters of everyday inquiry in our courts. On the other hand, the question as to political revolt in a foreign country, is logically and properly not within the jurisdiction of courts at all. On the continent of Europe generally, the whole question of extradition is decided by the political branch of the government, and it has been claimed—and justly—that this is not a good system, it being preferable to have the matter, or to be precise, that part of it which is admittedly justiciable, submitted to some tribunal, as is done in England and the United States; thus the point that I am about to suggest arises in those countries alone.

Our Supreme Court has repeatedly determined that matters of a political nature are exclusively within the determination of the executive branch of the government. The question as to what are the boundaries of a foreign country, or what is the legitimate government, and all general political and geographical facts concerning it, are matters for the executive department, rather than for the courts.

The courts of our country will not pass judgment upon the acts of sovereign states.

"Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory."—*Underhill v. Hernandez,* 168 U. S. 250.

Questions as to the existence of an insurrection or belligerency are matters to be determined by the Department of State and the courts will follow their decision in such matters, as was said by the Supreme Court in the case of *The Three Friends* (166 U. S., 1):

"*We are thus judicially informed of the existence of an actual conflict of arms* in resistance of an authority of a government with which the United States are on terms of peace and amity, although acknowledgment of the insurgents as belligerents by the political department has not taken place."

The reason for all this is obvious. The internal politics of a friendly nation are not matters upon which our courts can or should properly pass. Aside from the unfortunate diplomatic consequences which might follow from such action on the part of the judiciary, the courts are not equipped with the machinery necessary for the ascertainment and de-

cision of such questions. Whether the republic of Venezuela is at peace or whether rival factions are struggling for the mastery, is not for our courts to determine. If every petty judicial officer in the United States to whom extradition cases are referred is justified in determining whether or not a revolt or revolution existed in another land, we may at any time have a curious and embarrassing situation. A federal commissioner in Chicago might well decide that revolution was flagrant in the Russian Empire and that organized insurrection existed; while some State court in New York might hold that there was no disorder sufficient to constitute a condition of political revolt. This illustrates the unwisdom of allowing the courts to decide political questions. It is true as appears in the Castioni case, just cited, that the English courts (and apparently American courts likewise) have treated the question as one of fact to be judicially ascertained and determined; but no discussion of the wisdom of such a rule has taken place, and it would seem to me entirely competent and proper for a statute of the United States to enact that where the question of complicity in an insurrection in a foreign country is used as a defense to extradition, the commissioner or judge should obtain from the State Department its determination as to the existence of such a condition. I am unable to perceive

any reason in logic or in sound sense why this should not be done.

It is probably owing to the very few cases of political offense that have so far come before the courts that the attention of Congress has not been called to the advisability of such an amendment to the law. But the possible danger to our international relations of leaving such questions to any one of the committing magistrates throughout the country, State or Federal, is obvious, and the need for precluding it, imminent. Can it be pleasing to a foreign nation, with whom we are upon the best of terms of friendship, to learn that a commissioner in extradition has found, as one did a few years ago, that the whole Russian Empire, including the district in which the offenses were committed, was in a state of revolution? The fact that, geographically speaking, only a small portion of a very vast empire was affected by anything in the nature of revolt, may serve to palliate, but scarcely to wholly allay, the impression created in the country referred to. Nor would the converse of the suggestion be well received by our State Department. Should a foreign court have decided that some amiable and gentle "night riders," who might have fled Kentucky justice, were immune from extradition, because the American nation was in revolution, the suggestion would probably meet a very

cold response from the American people. It is neither wise nor just to charge the judiciary with the responsibility of such questions. When the decision is once made, if it discharges the prisoner, the State Department has no further control over the matter; a political question has thus been decided, without even right of appeal to the only branch of the government properly equipped to determine it and a possible international controversy set on foot without any opportunity afforded the Executive to avert it.

Such questions, indeed, must be decided, but as the responsibility for their decision ultimately falls upon the government, and can not be evaded by delegating it to a commissioner, would it not be better to have the question determined in the first instance definitely and finally by the State Department?

I am aware that not only have English and American courts treated the question as a judicial one, but that we have the high authority of Mr. J. B. Moore in favor of the practice (29 American Law Review). However, he treats the matter as one more or less settled by usage and the language of the British extradition treaty:

"At the end, extradition, whatever may be the character of the offense, is a political act; but prior to that stage, it is both in the United States and in

England chiefly a judicial proceeding, in which the person charged is entitled to be set at liberty whenever he has shown that his detention is not warranted by the treaty."

It is a political act, and it is only the occasion for its exercise which is to be judicially determined, because that occasion is the proof of a fact justiciable in its nature; but when the nations by treaty agree that the entrance of a political factor into the otherwise justiciable act shall exempt it from judicial action, the existence of that political factor is a political question which should be first determined as a preliminary jurisdictional fact.

As the cases on the subject are few, the present practice can not be regarded as settled by a course of judicial decisions; nor has it been settled as the result of any real consideration or discussion. I would prefer to suggest amelioration in the law, rather than merely recapitulate the precedents, and I have no hesitation in believing that both England and America might wisely and well take a leaf from the European book in regarding the existence of insurrection in a foreign land as a political fact, while Continental Europe might well copy the English and American practice in treating the question of the actual criminality of the accused as an ordinary triable fact.

One more difficult question remains: can not

some further limitation be placed upon "political offense" other than that already adopted by the courts and the general practice of nations, in refusing to consider as political crimes, the atrocities committed by anarchists and the assassinations committed by individuals, except in the course of civil commotion seriously akin to war?

Modern invention has made it easy for a few to do enormous injury to life and property. Under the criminal law of the State of New York, three men acting together are sufficient to create the quasi-political condition of "riot." With a sufficiency of dynamite and an ardent desire to overthrow the hated capitalistic régime in favor of a Utopian socialistic republic, much might be accomplished in the way of wholesale assassination. Would the law-abiding citizens of the Imperial State regard with equanimity a decision of a European government that the three men so acting were entitled to a safe and comfortable asylum in Paris, because, forsooth, they were political offenders merely, whom the New York law itself had characterized as "rioters?" Would our feelings be greatly different if the number of those who had taken part in the riot had been three hundred rather than three? An extreme case! The fallacy of mere logicians, I am told. Yet would not such a case fall within the English definition of political disturbance? Must

we not find some more precise and workable definition?

The need of some limitation is pretty generally recognized. For instance the Swiss-Austrian treaty of 1888 provides that political refugees may be surrendered although they are also charged with political crime, provided that they may only be prosecuted for the common law crime. The difficulty with this system is that it leaves to the demanding country the decision of whether the offenses are political or of common law. The Swiss law provides also that extradition will be accorded even where the accused alleges a political object, provided that the acts constitute mainly a common law crime. In practice it may not always be easy to disentangle and weigh the two elements, but the distinction seems to me to be a step in the right direction, and its establishment is no more difficult to diplomatic than to judicial acumen. It would preclude the possibility of failure to extradite in some such cases as that mentioned above, where the smallness of the number, and the utter hopelessness of the cause, rendered the act really a crime against the common law, however political the motives of the rioters may have been. The fanatically political and social motives of the famous John Brown can scarcely be questioned. Yet under such a criterion as this Swiss-Austrian treaty proposes, his

attempt to incite slave insurrection would be treated as common law crime.

We find an apposite illustration in our new possessions. For years discontent with political and economic conditions coupled with the natural instinct of man to revert to primitive barbarism led, in the Philippine Islands, to the condition called Ladronism. These ladrones were, in fact, bandits and robbers, but they acted in organized bands, lived in the open country and claimed that the motive of their acts was political. The question as to whether they plundered and murdered because of their political principles or whether the latter were a mere convenient accessory to their purely predatory instincts and operations, has been resolved by the statutes in force in the Philippine Islands and by the decisions of the Philippine Supreme Court in several cases. (*U. S. v. de Leon, et al.,* 3 Phil. Rep. p. 644.) The defendant in this case and his associates were charged with highway robbery and brigandage, and their principal defense seems to have been,

"That the organization had for its object to attack and contend with the constabulary forces and municipal police of the towns for the purpose of appropriating to themselves arms and ammunition, and to supply themselves for the purpose of forming an army for a future insurrection; in other words,

that the band was of a political nature and that the appropriation of property by the band was for the purpose of supporting them in attaining political ends."

We thus have here in one of our own courts a forceful and perfectly clear plea of political crime. The court makes short work of the contention, for it holds as follows:

"In several cases which have been decided by this court where it appeared that the organization of the party was of a political nature and that the members who formed such party or band committed acts coming within the definition of Act No. 518 against the highway robbery or brigandage, they may be properly convicted under this Act." (p. 646.)

Is there any reason or logic in treating one of our citizens or subjects as a highway robber or brigand, while considering a foreigner guilty of the same acts as a merely political offender, innocent of ordinary crime and outside of the purview of extradition treaties?

Should some of these ladrone gentlemen, feeling depressed by the insalubrious proximity of the Philippine constabulary seek refuge in Russia, it is not improbable that the United States might seek their extradition. Should that country apply our own standards, might it not well say that as the

acts in question were committed by members of a band in chronic hostility to, and in insurrection against, the government of the United States, the offenses were of a political character, and immunity, at least, if not fame, should await these malignly so-called robbers?

A rule such as that found in the Swiss law would aid in the solution of such cases.

A case decided some years ago by the State Department, illustrates the necessity for some revision of the commonly accepted American view. In the case of Christian Rudovitz, a Russian subject whose surrender was requested by Russia in accordance with the extradition treaty, the facts, as stated in the language of the Secretary of State refusing the surrender, were:

"That on the night of January 3rd, 1906, a party of some sixteen armed men, masked and disguised, came to the little village of Benen on the estate of Benen and, having gained entrance into certain houses of the village, killed a man (Christian Leshinsky), his wife (Trina Leshinsky) and their married daughter (Wilhelmina Kinze); that they also robbed the Kinze woman and her husband (Theodore Kinze) before killing her; and that some time during the occurrence they set fire to the house in which they had found and killed the mother, Trina. It does not appear that the men implicated in the affair gave at the time any reason for the

killing of Christian and Trina Leshinsky, though they are said to have declared that they killed the Kinze woman because she was a 'spy.' "

The defense was that the acts were done under the orders of and by members of the Social Democratic Party. Consequently the State Department concluded:

"In view of these facts and circumstances the department after a mature and careful consideration of the evidence so adduced in this case, finds itself forced to the conclusion that the offenses of killing and burning with which the accused is charged are clearly political in their nature, and that the robbery committed on the same occasion was a natural incident to executing the resolutions of the revolutionary group and can not be treated as a separate offense, certainly not as a separate offense by this man without some specific identification of him with that particular act, and of this there is no evidence whatever. Therefore, none of these offenses is such as will afford a proper and sufficient ground for the extradition of the accused to Russia. Neither the treaty nor the law of the United States limits the protection of political characters to acts which are approved by the government from which extradition is demanded. However much the government of the United States may deplore or condemn acts of violence done in the commission of acts for a political purpose, however unnecessary or unjustified they may be considered, if those acts were in

fact done in the execution of such a purpose, there is no right to issue a warrant of extradition therefor."

This decision of the department and the reasoning here adopted would seem to place the Philippine Ladronism propaganda in the domain of politics. If this be the law and the United States is forced to refuse extradition for acts which are abhorrent to rudimentary notions of morality, is it not time that some change be made in the law? Are we to be slaves to mere legalism, or will we try to fulfill the real purpose of extradition, viz.: remove from this country those persons whose brutal and hideous conduct, whatever its ultimate causes may have been, make them dangerous and unfit members of our society?

But we will be told if you refuse an asylum to a Rudovitz, you may be forced to do likewise in the case of a Lafayette. Not at all. Is legal language so feeble that we can find no rule to differentiate between acts which excite our severest condemnation and those which may well be admired?

The problem is not altogether new, and other solutions than that of the Swiss law have been proposed.

The Institute of International Law in its session at Oxford (1880), adopted the following resolutions:

"In order to judge the acts committed during a political revolution, or an insurrection, or a civil war, the state upon which the demand (of extradition) is made must decide whether it would be excusable by the law of war";

and at the same session passed another resolution which may, I think, be said to be declaratory of the present general practice:

"Acts which unite all the characteristics of common law crime (murders, arsons, robberies), should not be excepted from extradition solely by reason of the political intention of the perpetrator."

The system suggested in the first resolution is called that of war usage.

This system has not yet met with any general adoption. The Spanish law, however, defines and limits political crimes as follows:

"All attempts committed during a rebellion, against the public authorities, which would not be punished, under existing law, if they had been done by regular armies, or persons belonging to regular armies in time of war."

This proposed system has been criticized on the ground that war usages themselves are somewhat undetermined and that in civil wars, especially in the beginning, it is impossible to observe these

usages. It has, however, the great virtue of distinguishing between the means and methods by which a political result may be obtained and in so doing is in accord with the growing sentiment of the age to which murder and robbery are ever more abhorrent. It is a distinctive element of recent civilization that a common and international accord has been reached to mitigate the horrors and even the severity of war, and to condemn in its pursuit or under its compulsion every avoidable cruelty and every wanton or needless destruction. Is it too much to expect that at least the same measure or standard shall be applied to the acts of revolutionists or political malcontents, and that these shall not be permitted or encouraged to commit under the euphemism of political offenses acts which the common accord of nations classes as crimes against life or property?

A somewhat modified form of this doctrine was presented by M. Alberic Robin at the Geneva (1892) Session of the Institute of International Law and adopted. Among other things, it provides that:

"As far as concerns acts committed in the course of an insurrection or of civil war, by either the one or the other of the parties engaged in the strife, and committed in the interest of the cause, extradition can only be granted for those which constitute

barbarism and of vandalism forbidden according to the laws of the war and (extradition shall be granted) only when the civil strife has ended." [1]

Under such a system our State Department would no longer feel under the necessity of offering apologies for having refused extradition for acts which it "deplores" and "condemns."

In conclusion, then, let me suggest that the time has arrived to modify our law and treaty clauses as to political crime. Social expediency, broadening sentiments of humanity, regard for the morals and welfare of our own citizens, together with an appreciation of conditions which show social discontent as frequently resulting in a form closely akin to anarchy, would seem to demand that some limitations be placed upon the vague term "political offense."

These limitations upon the usual treaty clause might be in substance as follows:

Political offense shall not be deemed to include either

(1) individual acts of violence containing all the elements of common law crime, even though perpetrated from a political motive, or with a political intent or design;

(2) such acts when committed from motives of

[1] See Pandectes Français Art. Extradition, vol. 31, 430.

or to promote anarchy or the dissolution of all political organization;

(3) or acts committed during an insurrection of civil war which constitute odious acts of barbarism forbidden according to the laws of war.

And further, I should suggest an amendment to our extradition act requiring that the fact of the existence of insurrection in a foreign country, when raised as a defense to a demand for extradition be determined in the first instance by the Department of State.

Before closing, one word as to right of asylum. Much has been said in public discussions and in the press about asylum. The fact that the doctrine is unknown to international law and has never been recognized will not, in all probability, prevent our hearing much about this sacred right in future. It may be well to bear in mind, however, what our leading international lawyer and publicist, Professor Moore, has said on the subject:

"It has been the policy of the United States to discourage the granting of asylum, *not only because it has no foundation in international law,* but because it has often been found to involve an unwelcome interference in the affairs of other nations, and to be injurious both to national interests and to international relations."—John Bassett Moore *XXIV American Law Review,* "The case of the Salvadorean Refugees."

XI

THE CRISIS OF THE LAW; PROFESSIONAL INCOMPETENCY

THE bar can no longer afford to blink the fact that "the law" has become thoroughly unpopular. It may be that this unpopularity is in whole or in great part undeserved, but, in any event, we are not justified in refusing to examine into the question whether this be so or not. Popularity is no sure index of right or wrong; there is no divine justice in the judgment of a mob, and the opinion of the man in the street upon so big a matter as the Law may be of little moment; but when in our community a feeling is widespread, intense and of long duration, it is not safe to refuse to examine into its causes. The course of the Reformation might have been substantially modified and the excesses of the French Revolution wholly avoided if the governing classes had not been quite so complacently unheeding of popular discontent.

If the "Law" stand arraigned at the Bar of Public Opinion, the mere assertion by the agitator that

this is due to the rapacity or incompetency of the lawyer class has in it little value as an intelligent explanation and is quite as futile as the answer of the conservative that: "No rogue e'er felt the halter draw with good opinion of the law." In such a debate we quickly reach an *impasse* and leave the question to be solved by those mystic forces which govern human affairs and which may solve it in a way equally contrary to the theories both of the agitator and of the conservative.

The attack upon the legal profession is no novelty. The somewhat radical proposition that the lawyers be guillotined was modified in the French National Convention into the more conservative measure of merely suppressing the profession. A short experience, however, demonstrated that this measure was not calculated to bring about the Millennium and that the slow processes of blind justice and the droning disputes of the court room were on the whole less detrimental to the welfare of the community than "settlements" in the street.

No rough and ready explanation of the causes of the discontent with the law will suffice. What then are the real causes? To specify them all is probably impossible. The main ones are perhaps clear enough, however.

First, there are general causes of discontent throughout the community which it is not neces-

sary to deal with here. Specifically, however, there are two main causes which largely account for the popular distrust of the law and the lawyers. One of these is the fact, that the law of to-day and especially the judge-made law is somewhat out of harmony with real life. Law is, of course, mainly a resultant or a crystallization of sufficiently long continued general opinion in each community. In this last generation tremendous economic changes have so modified actual human relations that the American law of to-day reflects the views of the dead rather than those of the living and is in many respects far behind that of England, France or Germany. Individually progressive, we Americans are collectively very backward. As yet there has not been sufficient time for these new relations to find adequate expression in the law and the classes who profit by such inadequacy, reinforced by that great majority of persons of naturally conservative instinct who love a rule merely because it is old, regardless of the circumstances under which it originally arose and which made it useful, have been able to retard a necessary and inevitable adjustment. The fear that we may move too fast ignores the ineradicable tendency to follow custom which keeps the new generation from departing from the ways of their ancestors and which, healthful and necessary up to a certain point, means, when

untempered by radicalism, social stagnation. The instinct which made Chinese civilization stationary is not the exception but the rule; the opposite tendency is sufficiently exceptional to cause us little real apprehension.

It has been well said that the sense of equity of one generation tends to become the law of the next, but this gradual adjustment of law to justice has rarely seemed so slow a process as in recent years, because of the speed with which social and economic transformations have taken place.

With all this, however, I have here little concern other than to indicate that it is one of the two main causes of dissatisfaction.

There is, however, another and perhaps even more potent cause of discontent, which is not of yesterday and which has little or nothing to do with theories of government, but relates solely and simply to the ordinary administration of justice between man and man in the courts of Common Law.

The ordinary individual is either in some bread winning business or owns some property or both. At any time he may feel that his personal or property rights have been infringed. Naturally, and in an ideal community, he would seek the advice of one skilled in the law and would place himself under the protecting *ægis* of justice for a full vindication of his rights. In practice, however, it is notorious

that the ordinary individual, unless he is wealthy, idle or temperamentally litigious, shuns the courts. This is mainly because of the great expense and delay which cause him to believe that he had better forego (especially if he has ever been in a lawsuit) the attempt to vindicate his rights, rather than subject himself to a procedure which he does not understand and to be engaged in litigation, the end of which he can neither foresee nor foretell. He thus contents himself with making the best settlement he can, if any, and becoming an embittered critic of the law.

This is not a new evil. In the first half of the nineteenth century in England, it was said that no man in middle life beginning a suit in equity could possibly hope to live to see the end, and yet in the English law courts matters are now disposed of with an expedition, and a substantial justice which put us so-called progressive Americans to shame. Why is it?

Law reform is no new cry. In this State it has been mooted, agitated and enacted almost constantly for half a century and yet in 1904 the Commission appointed by the Governor, pursuant to Act of the Legislature, reported after a careful examination of the conditions of the Calendars in New York and Kings County that:

"The situation thus disclosed is of the gravest character. The authority of the courts is seriously impaired by their inability to render speedy justice, and they must accordingly suffer a loss of respect from the people who maintain them. 'Justice delayed is justice denied,' is a maxim of universal acceptation, and the indifference of any people to injustice marks the period of their decadence."

As though to emphasize the seriousness of the situation and the fact that these last sentences were penned in the full light of past history the words of Gibbon are quoted by the Commission:

"By these dilatory and expensive proceedings the wealthy pleader obtains a more certain advantage than he could hope from the accidental corruption of a judge."

These are not the views of persons ignorant or careless of the law, nor of orators on the hustings carried away by the applause of unsuccessful litigants, but the calm statement of a Commission of seven eminent lawyers two of them ex-presidents of the Bar Association.

Yet, we are constantly told that what we need is more law reform. The books must be cumbered with more statutes, or statutes already passed during periods of over-active law reform endeavor, are to be repealed. If this be true, the situation is dis-

couraging. Sixty years of legislation are to go for naught and we must begin anew.

It is, of course, true that our New York procedure is cumbersome, our code unwieldy and illogical. Every student of law knows that. It compares most unfavorably with procedure in many of our sister States where, as in England, most matters of practice and procedure are left to rules of court, few, simple and elastic.

Codification was once supposed to be the panacea, but so far codification has failed of its purpose. It must be admitted, however, that certain law reforms, especially in the simplification of procedure, would be useful, but I do not believe that generally speaking, the main abuses would be substantially affected.

The truth is that the fault is not inherent in our system of law. The Common Law is flexible, adaptable and not necessarily more cumbersome, slow, ineffective or expensive than the Civil Law System. Experience elsewhere has shown that it is compatible with the speedy determination of cases and substantial justice in ordinary matters. It is not pleasant to criticize one's own profession. It is still more painful to advert to the shortcomings of the judiciary. On the whole, in the United States, the bench and the bar have stood for individual rights and for justice and have behind

them a great historic record. The government of the United States has been one of lawyers rather than one of warriors, or of ecclesiastics, and has surely compared well with any that we know of in history. If then, we criticize the present condition of the profession and the judiciary, it is solely with a desire to indicate the real causes that have injured the influence of the profession.

To my mind, the general unpopularity, not to say disrepute, into which the law, and thereby the administration of justice in many parts of the country, has fallen, is due in large measure to incompetency both at the bar and on the bench.

Let me say at the outset that I believe our judges generally, both in New York and elsewhere, to be honest, industrious and anxious to be impartial, but in too many cases the necessary temperament, general education, previous experience, and technical skill are lacking in the courts, owing to the fact that the judicial positions are political rewards rather than well earned distinctions due to professional and civil service.

The functions of a judge are not difficult. A fair professional training, sound common sense and willingness to work are sufficient to make a judge efficient and esteemed. It must be remembered that the hard work is done by counsel. The judge who is attentive and is assisted by able counsel hears

both sides of every question thoroughly canvassed, the authorities in support of every proposition are adduced and analyzed and it is only necessary for him to decide between the conflicting views.

The judge, however, is much handicapped when not assisted by able counsel; especially in the City of New York with the tremendously crowded calendars, it is almost impossible, humanly speaking, for the judge himself to examine the authorities cited or to do much more than to read the briefs of counsel or hear their arguments. Where the case is complicated and the counsel inefficient, the judge is doubly burdened. Where a judge gets inadequate assistance from the bar he must be of more than ordinary ability not to fall constantly into error.

To those who have watched the lawyers coming to the bar in these later years, the ignorance and incompetency displayed by very many are appalling. Among them are many evidently very intelligent and well-equipped, but it is fair to say that a very large percentage, possibly considerably more than half who enter the New York City Bar are unfitted to enter any learned profession. The answers made by many of them to questions of examiners indicated that they had no grasp of the real duties or functions of a lawyer, no idea of the relations existing between law and morals, and that

they had simply memorized sufficient misunderstood matter to enable them to pass an examination. The spectacle is little short of lamentable, and the artificial character of the intellectual tests required was illustrated by the rather amusing feature that frequently some of the more intelligent and better-equipped young men coming from one of the great university law schools of the country had not been able to pass the examination until after several trials.

The admission of a large number of unlearned, unlettered and utterly untrained young lawyers with no *esprit de corps* and little regard for the traditions of the profession has been having and will continue to have a deleterious effect upon the administration of justice.

This condition is generally recognized in the large cities at least. The appellate courts are endeavoring to make admission more difficult; more stringent rules are being enacted and advocated; more complete courses of study and more adequate tests are constantly being required. I believe that in the respect of professional incompetency, we have seen the nadir. There is now a general movement at the bar to better this condition; it will require some years, but with the co-operation of public opinion and the assistance of the bench, much can be done. It is of more importance than legisla-

tive reform, which is of very little value when put into practice by men without character or training.

It is absurd to charge the deficiencies of the Code of Civil Procedure with the delay now encountered in our courts of justice. If some improvement has been made in New York since 1904 when the Commission on the Law's Delays reported, it is of a slight character and the bench has been considerably increased since that period. The delay is due to the fact, first, that trials take at least twice as long as they reasonably should. Our great criminal trials here have become a laughing stock. It sometimes takes more days to impanel a New York jury in a great criminal case than it takes hours in New Jersey or probably minutes in England. The courts do not dispose of one-half of the number of cases that they should in the time allotted to them.

Again, ignorance of the technicalities of the law results in a great number of reversals and of new trials, often in cases in which the result reached was just, but the methods used were subversive of precedent and of the orderly administration of justice. Enormous numbers of practice motions are made which never would have to be made if lawyers knew how to state their cause of action and draw their papers. Nearly all of these motions might be decided from the bench, if they

were properly presented by counsel and thoroughly understood by judges. The practice of holding these trivial motions for weeks, sometimes for months, is vicious.

Mr. Bryce in his biographical sketch of Sir George Jessel, late Master of the Rolls, relates that during his long and honorable career, upon only two occasions did he fail to decide the matter presented to him at the termination of the argument. And, yet, in New York City, trifling practice motions for amending answers, striking out portions of pleadings, making matters more definite and certain, etc., are taken under advisement for an indefinite time. The public naturally believe all this due to legal technicality and think the law a mere Chinese puzzle enacted by lawyers for the benefit of lawyers. The real fact being that had the people always been able to elect competent judges, and were clients represented by trained lawyers, a way could almost always be found to do justice without violence to those rules and precedents which are necessary in order to secure some degree of certainty and uniformity.

Incompetency at the bar is due in large measure to the great increase of the population that has taken place in our cities in a short time and the inadequacy of the rules for admission, which, when the bar was small and social conditions different,

were sufficient and may be sufficient now in the rural communities where the lawyers are well-known to the people and where the court house is a sort of social center. In those communities I believe less criticism of the law will be found.

The very real difficulty with the courts in many of the great cities of the Union, is the fact that the judiciary is in politics. It is obvious that there should be no partisan politics in the selection of judges, but as a matter of fact, judgeships have become among the best and richest political plums for the party machine. In the rural communities where the lawyers are personally known to voters, the system of popular election works fairly well as a selective system, and leading lawyers and citizens are frequently chosen, but in our great city of New York, any nominee of the dominant political party almost invariably goes through, save when other issues cause a political revolution.

A few years ago in New York, the bar attempted the experiment of independently nominating several highly reputable, respected and able lawyers for the bench and the number of votes which they polled was so ridiculously small as to indicate the belief that the community could not possibly have understood what was really at issue.

Political contributions have been a source of evil

and corruption, but they are peculiarly so when connected with judicial positions.

The Commission on the Law's Delays heretofore referred to, recommended among other things:

"the enactment of a law which shall prohibit under severe penalties the payment of any sum of money by a person who is a candidate or shall become a candidate for a judicial office, either in advance of his nomination or thereafter as a contributor to the political party, a person or persons nominating him, either directly or indirectly, or the reimbursement by such person of any other person or organization for moneys so paid or advanced; and an equally severe prohibition against receiving such moneys or contributions,"

and they stated among other things that they understood

"public opinion on the subject to be quite well crystallized."

The Corrupt Practices Act (Election Law, Sec. 540, *et seq.*) endeavors evidently to carry out this recommendation, although not applying specifically to the judiciary, but Sec. 780 of the Penal Law prohibits any candidate for judicial office from directly or indirectly making any contribution of money. The law is one, however, that can be easily evaded. The contributions may be made by

a candidate's friends even without the candidate's knowledge, or at least without his active participation in securing or paying the money.

I doubt whether this evil can be eradicated by law. That it should be eliminated, that it is one of the causes of the inefficiency and incompetency, sometimes found upon our bench, cannot be doubted; that it may upon occasion come perilously near to the purchase of the office is evident.

We presume that this system has no open partisans and that judicial positions will never become, as they once were, matters of property. Even down to the French Revolution magistracies were hereditary and alienable as is the office of "avoué" in France to the present day, but this was a regulated, recognized system and certain tests were applied to the individual holding the office before he could enter upon his property. Solicitors had a property right in their offices in Porto Rico down to the time of the American occupation and the Supreme Court of the United States has recently decided that these positions ceased with the relinquishment of the Spanish sovereignty and that the unfortunate incumbents of these comfortable monopolies had no claim against the United States. *Alvarez y Sanchez v. U. S.* (216 U. S., 167).

We Americans, however, are peculiarly sensitive on the subject of the judiciary. On the whole our

judges are upright men. No such scandals as disgraced the Tweed régime have arisen of later years, but the political conditions, the domination of the machine, the tremendous electorates in our leading cities too vast to know the candidates, even by name, have not infrequently brought upon the bench well-meaning, mediocre men, without the intellectual grasp, general education or the professional training necessary to make effective judges. Coupling with this the fact that we have no barrister system, that our system of admission to the bar is still inadequate, that the prizes of commercial and office practice have become, owing to industrial development, much greater than those of the forum, and that thus the judges get inadequate assistance from the bar, we have, I think, an explanation of much of the delay and expense incident to the dangerous venture of launching a law suit in so many of our States and cities.

As usual, it is easier to state the difficulty, which after all is thoroughly known at the bar, than to indicate a remedy. I have little confidence in statutory remedies. The great English legal reforms initiated by Jeremy Bentham were brought about under a pressure of public opinion which was irresistible and which had determined that the evils burdening the administration of justice must disappear. They too, were long in coming.

We must insist upon a higher standard of character and legal education for admission. This will check much of the evil at its very source. Possibly at the next constitutional convention we may so amend our State constitution as to require qualifications, other than that of being merely a member of the bar, for eligibility to the bench. This is a subject which should be discussed by lawyers and an attempt made to formulate some specific measures.

As to the judges, the elective system is probably evil, but has come to stay. It is doubtful if it can be changed. There then remains no remedy save to impress upon the community that the evils of the law are largely of their own making, that if they exerted themselves to elect able and competent men, regardless of political considerations, much of their cause for complaint would be removed. The Mayor, the Aldermen, or even the Governor are of comparative insignificance as compared with the courts. If the citizen is assured that his constitutional, personal and property rights will be wisely safeguarded and that adequate and speedy justice will be meted out to him when he is entitled to it, the passing of one political régime or another, cannot seriously affect the pursuit of his liberty or happiness. When he once realizes that he has no political function so important as to busy himself about the election of competent judges, law reform

will become a comparatively minor matter. Sluggishness, inertness and indifference on that subject will be rewarded as they surely deserve to be by delay and denial of justice and consequent discredit to the lawyers.

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